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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HAZARDOUS WASTE TREATMENT COUNCIL,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, is intended, among other things, to reduce the threat to the environment posed by hazardous wastes. In these cases, Petitioner Hazardous Waste Treatment Council, a national organization of firms in the business of treating hazardous wastes, sought review of certain Environmental Protection Agency ("EPA") rules on the ground, *inter alia*, that those rules were too lax and, therefore, inconsistent with the language and intent of RCRA.

In *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), this Court held that under the Administrative Procedure Act, a party who has Article III standing may obtain review to hold an agency to the requirements of a statute so long as his interests bear "a plausible relationship to the policies underlying" the statute in question. But detecting an "apparent anomaly" in business organizations seeking *stricter* environmental regulation, the Court of Appeals ordered the parties to address petitioner's standing under RCRA to take pro-environment positions, and ultimately held that petitioner was barred from pursuing pro-environment "competitor claims." The question presented by this petition is:

> Whether a trade association whose members provide the services needed to fulfill Congress' environmental objectives, who have invested in and developed the technology that Congress intended to promote as a necessary step toward achieving its environmental objectives, and whose businesses are directly injured by EPA's refusal properly to implement provisions of RCRA that create the market for their services, lacks standing to obtain judicial review of the inadequacy of EPA's implementing regulations because it is unable to show that Congress expressly intended to benefit such firms or that it is an "unusually suitable champion" of Congress' objectives.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 19.4 of the Rules of this Court, this petition seeks review of two judgments of the United States Court of Appeals for the District of Columbia Circuit. The United States Environmental Protection Agency was the sole designated respondent in all of the cases at issue in each judgment. In the case designated No. 86-1143 below, the Hazardous Waste Treatment Council was sole petitioner.* Edison Electric Institute, National Rural Electric Cooperative Association, American Public Power Association, and their individual utility members intervened in support of EPA. The Hazardous Waste Treatment Council was the petitioner in the cases designated Nos. 87-1548 and 88-1177, and Petro-Chem Processing, Inc. was the petitioner in No. 87-1487.** These latter three cases were consolidated by the Court of Appeals.

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* The Hazardous Waste Treatment Council is a national trade association of firms and individuals engaged in, *inter alia*, the high-technology treatment and recycling of hazardous wastes. Pursuant to this Court's Rule 28.1, the Treatment Council states that it is a nonprofit corporation with no parent or affiliate companies.

** Petro-Chem Processing, Inc. has informed counsel for petitioner that it will not participate in proceedings before this Court. A letter stating the same has been filed with the Clerk and served on all parties to the proceeding below in compliance with this Court's Rule 19.6. Therefore, the Treatment Council is the sole petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Hazardous Waste Treatment Council prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the District of Columbia Circuit dated October 7, 1988, and January 13, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals dated October 7, 1988 is reported at 861 F.2d 277 and is set forth in the Appendix at 1a-27a. The opinion of the Court of Appeals dated January 13, 1989, not yet reported, is set forth in the Appendix at 30a-40a. Both opinions arose out of proceedings under the Administrative Procedure Act to review orders of the Environmental Protection Agency.[1]

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[1] In No. 86-1143, petitioner sought review of a final rule published at 50 Fed. Reg. 49,164 (1985) (codified at 40 C.F.R. Part 266). In Nos. 87-1487 and 87-1548, petitioners sought review of regulatory action published at 52 Fed. Reg. 34,779 (1987) (to be codified at 40 C.F.R. Part 270). In No. 88-1177, petitioner sought

JURISDICTION

Pursuant to Rule 19.4 of the Rules of this Court, this petition prays for issuance of the writ with respect to two related judgments of a single court, the United States Court of Appeals for the District of Columbia Circuit. The opinion and judgment in No. 86-1143 below was entered on October 7, 1988 and a timely petition for rehearing denied on December 20, 1988. App. 28a. The opinion and judgment in Nos. 87-1487, 87-1548, and 88-1177 below was entered on January 13, 1989. This petition is filed within 90 days of the denial of rehearing in the earlier case. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, provides that

> [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 7006(a)(1) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6976(a)(1), provides that

> [a]ny judicial review of final regulations promulgated pursuant to this chapter and the Administrator's denial of any petition for the promulgation, amendment, or repeal of any regulation under this chapter shall be in accordance with sections 701 through 706 of title 5 . . . .

STATEMENT OF THE CASE

In these cases, the court below established a new test of "prudential standing" to limit the ability of business firms suffering commercial injury to press for *stricter*

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review of portions of a final rule published at 52 Fed. Reg. 46,946 (1987) (to be codified at 40 C.F.R. Part 264).

enforcement of environmental laws. By denying a right of judicial review to firms with an immediate financial interest in developing the technology and treatment capacity that Congress recognized as a necessary step toward meeting its environmental objectives, the decision below creates a substantial obstacle to the implementation of environmental laws. Because of the importance of this case to the enforcement of those laws in particular, and the significance of the question whether the lower courts are free to create new barriers to limit review of administrative failures to implement statutory directives where review is sought by firms whose commercial interests are intertwined with Congress' statutory goals, the Treatment Council has petitioned for certiorari.

The Hazardous Waste Treatment Council

The Hazardous Waste Treatment Council is the largest association of hazardous waste treatment firms and manufacturers of treatment technology in the country. The Treatment Council represents over sixty companies with operations in forty-eight states. As recounted by the Court of Appeals, the Treatment Council's member companies

> provide treatment or disposal services employing both established and emerging technologies and methods for treatment and management: incineration and other thermal destruction, reclamation, biological and chemical treatment, land disposal after pre-treatment, and hazardous site cleanups.

App. 5a-6a. The Council's Articles of Incorporation declare that among its purposes is

> [t]o promote the protection of the environment through the adoption of environmentally sound procedures and methods of destroying and treating hazardous wastes and the proper management of residues of those treatment and destruction processes.

App. 6a.

The Treatment Council represents firms whose economic interests and future viability depend largely on the presence, not the absence, of appropriate regulations for protection of the environment—regulations which create the demand for their advanced waste treatment technology and services. Accordingly, the Treatment Council has a strong incentive to participate in the legislative process in support of pro-environment positions, to participate in EPA rulemaking, and, where necessary, to vindicate Congress' will through litigation if EPA fails properly to implement and enforce the requirements of RCRA.[2]

The Resource Conservation and Recovery Act of 1976

In the Resource Conservation and Recovery Act, Congress sought to provide a comprehensive regulatory program for the management and safe disposal of hazardous waste. In particular, the 1984 amendments to RCRA set forth restrictions on the management of hazardous waste, including detailed requirements for hazardous waste generators, transporters and owners and operators of treat-

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[2] For example, during the 1984 reauthorization to RCRA, the Treatment Council successfully advocated amendments to close a loophole in RCRA that allowed the burning of hazardous waste in industrial boilers and furnaces where energy recovery was involved —including specifically RCRA Section 3004(q)(2)(c), 42 U.S.C. § 6924(q)(2)(C), at issue in Nos. 87-1487 and 87-1548, which requires among other things that big city cement kilns may not burn fuel which contains hazardous waste unless such kilns fully comply with EPA's regulations for incinerators. *See, e.g., Solid Waste Disposal Act Amendments of 1983: Hearings on S. 757 Before the Subcomm. on Environmental Pollution of the Senate Environment and Public Works Comm.*, 98th Cong., 2d Sess. 187, 195 (1983); *Resource Conservation and Recovery Act Reauthorization: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Energy and Commerce Comm.*, 97th Cong., 2d Sess. 505-530 (1982). In addition, the Treatment Council successfully testified in support of amendments creating land disposal restriction, of which the salt dome prohibitions (at issue in No. 88-1177) were a part. *See Senate Hearings, supra*, at 189-95.

ment, storage and disposal facilities. *See, e.g.*, 42 U.S.C. §§ 6921-24; 40 C.F.R. Parts 260-270. With the 1984 amendments to RCRA, Congress tried to promote environmentally sound waste management practices "by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment." 42 U.S.C. § 6902(a)(6).

The Conference Committee reports on the 1984 amendments, for example, made clear that as a means of achieving its ultimate goal of protecting the environment, Congress consciously sought to promote the use of the services and technology that Treatment Council members provide and to create industrial treatment capacity adequate to handle the Nation's hazardous wastes. Thus, the legislative history shows that "the Conferees intend . . . that advanced treatment, recycling, incineration and other hazardous waste control technologies should replace land disposal"—such as salt domes, underground mines, and caves. H.R. Rep. No. 1133, 98th Cong., 2nd Sess. 80 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 5649, 5651. Specifically, to promote investment in and expansion of capacity of the industry represented by the Treatment Council, Congress expected EPA *not* to create a climate where "the regulated community believes that . . . deadlines will normally be extended and that immediate investment in development of alternate capacity will be premature and economically non-productive." S. Rep. No. 284, 98th Cong., 1st Sess. 19 (1983). The Senate Environment and Public Works Committee stressed that "[g]iven consistent *regulatory and economic incentives*, adequate [treatment] capacity will be quickly developed," and that "[w]ith the elimination of cheap, unsafe . . . alternatives, *treatment capacity* and inexpensive 'milk-run' style collection services *will develop* to meet regional demands." *Id.* (emphasis added).

Thus, one of Congress' goals in enacting and amending RCRA was the rapid development of a hazardous

waste treatment industry with sufficient capacity to meet both present and future needs. Congress appreciated that in order to create a "new market and increased demand for new, safer treatment and disposal technologies," market incentives for the development of such technologies and industrial capacity would have to be strengthened.[3] Congress sought to encourage the development of that technology and capacity by ensuring a market for those services through strict and comprehensive regulation requiring proper treatment of hazardous waste.[4]

No. 86-1143

No. 86-1143 below was a petition for review of EPA rules for the burning of hazardous wastes, including used oil, as fuel. *See* 50 Fed. Reg. 49,164 (1985) (codified at 40 CFR pts. 261, 264-66, 271). The Court of Appeals summarized that the "gist of [the Treatment Council's] complaint here is that EPA's regulations are not comprehensive and strict enough to comply fully with the controlling statute, RCRA." App. 5a.

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[3] 130 Cong. Rec. S13818 (Oct. 5, 1984) (Statement of Sen. Chafee). As Senator Chafee explained:

> The problem presented by land disposal of hazardous wastes is a classic example of the inability of the free marketplace to provide for the public good . . . . We have the technology to reduce the quantity of hazardous waste disposed of on the land and to render the waste less harmful. What we do not have, and will not have as long as cheap land disposal options are available, is a viable market to support the development and expansion of new, safer treatment and disposal technologies.

Id.

[4] *See also* S. Rep. No. 284, 98th Cong., 1st Sess. 6 (1983) (capacity for "alternative technologies" can "be developed if a viable market can be assured"); H.R. Rep. No. 198, 98th Cong., 1st Sess. 32 (1983) ("prudent public policy" would "encourage the development of alternative treatment technology and capacity").

EPA did not initially challenge the Treatment Council's standing to raise these issues. Nonetheless, the Court of Appeals was struck by what it saw as "the apparent anomaly of regulated entities demanding stricter regulation," and *sua sponte* ordered the parties to brief the issue. App. 5a. What followed was an exchange of briefs and affidavits, including several affidavits submitted by the Council and its members describing the purpose of the organization and its members' interest in the implementation and enforcement of RCRA.

In approaching the standing issue, the Court of Appeals did not, and could not, dispute that "the asserted laxity of the regulations will diminish the market for [the Treatment Council's] high-tech control services," thereby causing economic injury.[5] App. 6a. Neither did it doubt that while the forms of hazardous waste disposal which Treatment Council members employ are heavily regulated under RCRA, the EPA regulations in question exempted other forms of disposal from the same sorts of regulations, affecting the ability of Treatment Council members to compete with those methods. The Court of Appeals panel referred to these types of claims as "competitor claims." [6] App. 6a.

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[5] The fact that petitioner has suffered Article III "injury-in-fact" was not questioned by the Court of Appeals. The question presented is whether an entity suffering such injury-in-fact is to be barred from review under a "prudential" rule like the one the Court of Appeals created.

[6] The Court of Appeals noted that at least one Treatment Council member receives non-hazardous used oil from heavy manufacturing industries for processing and resale as boiler fuel. Because these firms would have to spend more to process adulterated or contaminated oils, "more stringent EPA regulation would tend to protect it from this sort of injury." The Court of Appeals termed these "consumer claims" and held that this direct handling of an item subject to regulation conferred standing on the organization to present certain claims. App. 7a.

Addressing these "competitor claims," the Court of Appeals panel found "that tightening of environmental standards will generally foster not only a cleaner environment but also the member companies' profits, as it will expand the market for their services." App. 9a. But deeming this an "incidental benefit," the Court of Appeals held that this Court's decision in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987), left the "status" of this type of commercial injury "somewhat unclear." App. 10a.

Citing the "zone of interests" test, the Court of Appeals acknowledged this Court's statement that the "test is not meant to be especially demanding" and that "in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." App. 10a, *quoting Clarke*, 479 U.S. at 399-400. But noting that the test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit," (App. 10a, *quoting Clarke*, 479 U.S. at 399), the Court of Appeals found the need to create a new test for "prudential standing." Under this test, a plaintiff like the Treatment Council must show *either* a plainly expressed congressional intent to benefit him *or* that he would be an "unusually suitable champion" of Congress' goals. App. 10a-11a.

Here, the panel found it decisive that there was no specific showing of intent "to benefit recycling and disposal firms." App. 11a. The fact that these firms provide the technology indispensable to achieving Congress' goal, and their business existence depends upon the effectiveness of the agency's regulatory activity, did not confer "prudential standing" because: "in the absence of either some *explicit* evidence of an intent to benefit such firms, or some reason to believe that such firms would be unusually suitable champions of Congress's ultimate

goals, no one would suppose them to have standing to attack regulatory laxity." App. 11a (emphasis added). The Court of Appeals found itself unable "to picture such firms as suitable challengers of the agency," (App. 12a), where the claim was that the agency was not implementing the law with sufficient diligence.[7]

Nos. 87-1487, 87-1548, and 88-1177

These three cases were addressed in a single decision and judgment by the Court of Appeals. In Nos. 87-1487 and 87-1548, the Treatment Council and an individual company, Petro-Chem Processing, Inc. (not a member of the Treatment Council), sought review of an EPA regulatory extension which enlarged by more than three years the deadline for "big city" cement kilns to apply for "interim status," which would allow such kilns to burn liquid hazardous waste without a permit. This extension adversely affected Treatment Council members because it allowed competitor facilities to burn hazardous waste derived fuels under standards which are substantially more lenient than the standards which apply to

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[7] The court below noted that "many cases allow[] standing to firms whose sole concern is exposure to unwanted competition" and cited several cases of this Court, including *Clarke* itself. App. 12a. The court below also noted the cases of this Court which did not require any showing of express intent by Congress to confer competitive benefits on the plaintiff, although standing was allowed. To explain those cases, the Court of Appeals reasoned that this Court must have assumed, "without evidence, that entry-restricting legislation is intended to shelter competitors" but that legislators are reluctant to articulate that goal; therefore, in those cases, this Court's unarticulated assumptions about the unspoken legislative goal sufficed to confer standing. App. 13a. The Court of Appeals declined to apply that reasoning here, however, finding that to allow the pecuniary beneficiaries of a regulatory program to seek stricter enforcement of the regulatory program "would eliminate the prudential standing requirement." App. 14a. The Court of Appeals, therefore, dismissed the Treatment Council's "competitor claims."

fully permitted facilities, making that method of disposing of wastes competitively more advantageous.

In No. 88-1177, the Treatment Council sought review of EPA regulations which authorized the disposal of hazardous waste in salt domes, salt bed formations, underground mines and caves. Specifically, the Treatment Council contended that these regulations were directly contrary to RCRA's flat prohibition on the "placement" of hazardous wastes in these geologic formations without a permit. *See* 42 U.S.C. § 6924(b)(2). Treatment Council members were adversely affected by this rule because the use of unprotective land disposal methods (such as salt domes) avoided the need for Treatment Council members' services and frustrated the investment of Treatment Council members in their high technology solutions to the hazardous waste disposal problem—solutions that Congress had expressly sought to encourage by barring land disposal. *See* pp. 4-6 *supra*.

Considering itself bound by the decision of the panel in No. 86-1143, the panel in these cases held that "the prudential requirements for standing under RCRA" were not met by the commercial injury that Treatment Council members would suffer on account of the agency's failure to implement the statutory directive. Review was barred "[i]n the absence of any suggestion either of congressional intent to improve the competitive position of high tech recyclers, or of any reason to picture such firms as suitable challengers of the agency." App. 34a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A SIGNIFICANT BARRIER TO REVIEW OF AGENCY ACTION, DIRECTLY CONTRARY TO THE STANDARDS SET FORTH BY THIS COURT IN *CLARKE*.

In *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987), this Court held that the APA sets forth a "presumption in favor of judicial review of agency

action." In light "of Congress' evident intent to make agency action presumptively reviewable," when a particular plaintiff (suffering injury-in-fact) seeks to challenge an agency's implementation of a statute, there *"need be no indication of congressional purpose to benefit the would-be plaintiff."* *Id.* at 399-400 (emphasis added). Expressly disapproving a prior line of cases from the District of Columbia Circuit setting forth substantial "prudential barriers" to review of administrative action,[8] this Court held that the APA's "generous review provisions" should be construed "not grudgingly but as serving a broadly remedial purpose . . . ." *Id.* at 395 (citations omitted). More particularly, the Court held that so long as Congress has not manifested an intention to preclude review, the APA's standing requirements are satisfied if the plaintiff's interests bear a "plausible relationship to the policies underlying" the relevant statute.[9] *Id.* at 403.

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[8] Specifically, the Court in *Clarke* expressly rejected the "intent to benefit" requirement which had been applied by the D.C. Circuit in *Control Data Corp. v. Baldrige*, 655 F.2d 283 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981), and which that court has resurrected in these cases. *See Clarke*, 479 U.S. at 400 n.15.

[9] Absent a direct indication of congressional intent to bar suit, the presumption of review may only be rebutted in the following circumstances:

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke, 479 U.S. at 399-400. The "so marginally related to or inconsistent with the purposes implicit in the statute" standard is encapsulated in the phrase "plausible relationship to the policies underlying" the relevant statute.

A. The Court of Appeals Has Transformed the Rule that there Need Be No Evidence of Intent to Benefit, and Petitioner Must Show Only An Interest Having A Plausible Relationship to Statutory Policies, Into a Requirement that there be "Explicit Evidence of Congressional Intent to Benefit" or a Showing that Petitioner Is an "Unusually Suitable Champion."

The opinions of the court below turn both the language and the premises of *Clarke* on their head, restoring the barriers to review of agency action that this Court expressly disapproved. Finding *Clarke* "somewhat unclear," the court below declared that a firm or group of firms seeking review of an agency failure to implement the law must shoulder the burden of demonstrating "some *explicit* evidence of [congressional] intent to benefit" them competitively, or that there is "some reason to believe that such firms would be unusually suitable champions of Congress's ultimate goals." App. 11a (emphasis added). This is precisely what this Court rejected in *Clarke*. Instead of presuming that a business that will concededly suffer financial injury from unlawful agency action has standing to challenge that action unless his interests bear no plausible relationship to the purposes of the statute, as *Clarke* expressly held (479 U.S. at 403), the Court of Appeals has transformed those standards for businesses suffering market injury as a consequence of agency failures to enforce the law. The rule that there need be *no* express intent to benefit but that the petitioner's interests must bear a plausible relationship to the statutory policies, has become a requirement for a showing of some *express* intent to benefit the petitioner, or reason to believe that petitioner is an "unusually suitable champion."

In contrast, other courts of appeals have had little difficulty applying *Clarke* directly to the same kinds of

claims as were at issue here.[10] They have found no need for new "tests" to supplant the "plausible relationship" standard set forth in *Clarke* itself. Without the creation of such a new, review-limiting "test," other courts have reached results directly contrary to those reached by the court below in this case. *E.g., DeLoss v. Department of Housing & Urban Development*, 822 F.2d 1460 (8th Cir. 1987); *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 860 F.2d 229 (7th Cir. 1988); *City of Milwaukee v. Block*, 823 F.2d 1158 (7th Cir. 1987). The effect of reversing the presumption and revising the standard as the court below did here is determinative—particularly where full enforcement of the environmental laws, or other health and safety statutes, is at issue. Congress' primary articulated goal under such laws is invariably to protect the health and safety of many citizens. Switching the presumption requires the court to disregard the fact that as a means of achieving that ultimate goal it may be necessary to promote the development of certain industries along the way. As shown below, that is precisely the case here.

Apart from the mischief done to this Court's decision in *Clarke*, and to Congress' intent to assure agency compliance with its statutory mandate through private review actions, the "unusually suitable champion" test embarks the courts upon a highly subjective inquiry. That inquiry is not guided (as *Clarke* requires, 479 U.S. at 401) by analysis of the *overall* statutory context:

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[10] The decision of the United States Court of Appeals for the District of Columbia Circuit has *decisive* importance for the effective implementation of the environmental laws because that court has *exclusive* jurisdiction over the administrative implementation of many federal environmental statutes, including RCRA. *See, e.g.*, RCRA § 7006(a)(1), 42 U.S.C. § 6976(a)(1); Clean Air Act, 42 U.S.C. § 7607(b)(1); Safe Drinking Water Act, 42 U.S.C. § 300j-7(a)(1); Comprehensive Environmental Response, Compensation and Liability Act ("Superfund"), 42 U.S.C. § 9613(a); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1276(a).

In these cases, for example, the Treatment Council provides the technology, equipment and treatment capacity that Congress sought to develop and encourage with RCRA.[11] The Treatment Council and its members are in the very business of accomplishing what Congress sought to accomplish in that statute. The special expertise of the Treatment Council, born of the market, is precisely the kind of expertise Congress would expect an agency to rely upon in promulgating regulations.[12] Nonetheless, under its test, the Court of Appeals' concluded, *ipse dixit*, that there was "no reason to picture such firms as suitable challengers" of the agency's failure to implement regulations that would allow Congress' environmental goals to be achieved.

Because the court below was focusing upon the presence or absence of "some *explicit* evidence of an intent to benefit" these firms (App. 11a), rather than a "plausible relationship" between their interests and the statute's objectives, it never considered the statute's "overall context," as *Clarke* expressly requires. Had the court applied the standards of *Clarke*, it would have been clear

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[11] *See* 42 U.S.C. § 6902(a)(6) (RCRA's goals include "encouraging process substitution, materials, recovery, properly conducted recycling, reuse and treatment").

[12] The kinds of pecuniary interests that the Court of Appeals here demeaned are precisely the kinds of interests that the Framers understood would inspire participation in the legislative process. Through substantive administrative rulemaking, Congress has shifted the arena in which these arguments are sifted, from the legislature itself to administrative agencies—with a right of judicial review. But in changing the forum in which these matters are resolved, there is no indication that Congress sought to restrict the people who might be allowed to participate in, and influence with their arguments, the process of making "quasi-legislative" rules. On the contrary, there is every reason to believe that Congress expected the right of participation in the rulemaking process to be as broad as it would be in the legislative process. Judicial review is necessary to ensure that the participation of a party in the administrative process is taken seriously. *See* Part II *infra*.

that encouraging the development of high technology treatment capacity bore a close relationship to Congress' plan for protecting the environment. RCRA's legislative history is replete with evidence that Congress intended

> to "provide a meaningful regulatory program to increase the treatment of hazardous waste *and the development of new treatment capacity*;" [13]
>
> to ensure "*that advanced treatment, recycling, incineration and other hazardous waste control technologies should replace land disposal*;" [14]
>
> "*to force the full development of alternative waste management technologies currently in existence*, but which are vastly under utilized;" [15]
>
> and to "*provide incentives for* [*the*] *development of treatment and disposal practices* that minimize threats from those hazardous wastes that continue to be produced." [16]

In fact, Congress sought to ensure that EPA's regulations would be enforced consistently and evenhandedly so that firms could rely on that enforcement in making investments in new technology and treatment capacity without fear that lax agency implementation would destroy that investment. EPA was expected to put in place "consistent regulatory and economic incentives" to encourage "immediate investment in [the] development of alternative capacity." S. Rep. No. 284, 98th Cong., 1st Sess. 19 (1983).

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[13] H.R. Rep. No. 198, 98th Cong., 1st Sess. 39 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 5576, 5598 (emphasis added).

[14] H.R. Rep. No. 1133, 98th Cong., 2nd Sess. 80 *reprinted in* 1984 U.S. Code Cong. & Admin. News 5649, 5651 (emphasis added).

[15] 129 Cong. Rec. H6505 (daily ed. Aug. 4, 1983) (Statement of Rep. Breaux) (emphasis added).

[16] 130 Cong. Rec. S9147-48 (daily ed. July 25, 1984) (Statement of Sen. Stafford, Chairman of the Senate Committee on Environment and Public Works) (emphasis added).

Not surprisingly, Congress was aware that the market could be mobilized to achieve RCRA's aims and sought to employ the market to develop the technology and treatment capacity to ensure a safer environment. Business was not outside the process, but part of it. Congress knew that it could not rely on then-existing market incentives to create a "new market and increased demand for new, safer treatment and disposal technologies" if RCRA's objectives were to be achieved.[17] Recognizing that "[i]ndividual entrepreneurs and small businesses are frequently the source of new technologies and new ideas that can become tomorrow's innovative approaches to hazardous waste treatment," [18] Congress intended the 1984 RCRA amendments to stimulate investment in these new technologies by providing assurance that strict regulations would ensure that the new technology would be used.[19]

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[17] 130 Cong. Rec. S13818 (daily ed. Oct. 5, 1984). *See* note 3 *supra*.

[18] 129 Cong. Rec. H8159 (daily ed. Oct. 6, 1983) (Statement of Rep. Skelton).

[19] Congress specifically regarded the type of advanced treatment technology offered by Treatment Council member companies as a model for what it envisioned for the industry:

> Alternatives to land disposal exist. I know, because in York, PA, in my district, Envirite Corp. [a Treatment Council member] operates a state-of-the-art facility that treats hazardous metal finishing wastes and certain other wastes that are principally contaminated by inorganic constituents. Envirite's treatment technologies and management methods convert toxic and hazardous wastes to nonhazardous wastes prior to their ultimate disposal. *This kind of treatment process should serve as a model to EPA in implementing the land disposal restrictions of H.R. 2867.*

129 Cong. Rec. H8896-97 (daily ed. Oct. 31, 1983) (Statement of Rep. Goodling) (emphasis added).

Thus, far from being "inconsistent" with, or "marginally related" to the underlying statute,[20] one of Congress' clear purposes in enacting RCRA—though obviously not the ultimate purpose—was to foster the development of waste management technology and an industrial base with sufficient capacity to meet the Nation's needs. The means of spurring the development of that capacity was the assurance of strict and evenhanded enforcement—precisely what the Treatment Council was attempting to insist upon in these review actions. By switching the burden to require an *express* showing of intent to benefit, or an "unusually suitable champion"—rather than merely a "plausible relationship to the purposes of the statute," as *Clarke* requires—the court below focused only on Congress' ultimate goals to the exclusion of the elements necessary to make the scheme work. Thus, in this case, the Court of Appeals' review-limiting test caused it to look for the forest—and to miss all of the trees.

B. The Marketplace Injury that the Court of Appeals Found to be a Questionable Basis for Review of an Agency's Failure to Implement the Law Provides a Sound Basis Upon Which to Premise Review of Unlawful Agency Action.

In establishing its new rule, the Court of Appeals was plainly influenced by the "apparent anomaly" of an entity claiming *financial* injury as the predicate for advocating lofty "pro-environment" positions. This reaction rests on

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[20] It is telling that, in these cases, EPA did not challenge the Treatment Council's standing to bring these actions until invited to do so by the Court of Appeals in the first of them, 86-1143. In fact, in other recent contexts, EPA has openly acknowledged the consistency between the Treatment Council's goals and those of RCRA. *See* 52 Fed. Reg. 43,906 (1987) ("The purpose of the Treatment Council and the objectives of RCRA [are] to promote health and environmental protection by minimizing land disposal of hazardous wastes and by encouraging the recycling, reuse and treatment of such wastes.")

a fundamental misperception of the significance with which the law regards marketplace injury for purposes of determining "prudential" standing.

The Treatment Council's basis for seeking judicial review to ensure that its views are taken seriously in the administrative process follows conventional lines. With respect to certain of the regulations cited as too lax, "the market for the services of these members of the Council will be smaller than it would have been if the EPA had adopted the Council's views." App. 6a. With respect to others, "the EPA ruling tends to enable . . . competitors to undersell" Treatment Council members because they are allowed by EPA to avoid the stringent treatment that Congress intended. App. 7a. A law requiring stringent waste management induces firms to invest in new facilities and develop new technologies—a classic economic interest that is frustrated when the agency fails to implement the law through regulations consistent with Congress' intent.

1. As the Court of Appeals itself recognized, standing based on injuries of this type mirrors a long line of cases "allowing standing to firms whose sole concern is exposure to unwanted competition." App. 12a, *citing Clarke*, 479 U.S. at 403; *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970). *See also Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). Following *Clarke*, appellate decisions from other circuit courts have uniformly held that such competitive injury is sufficient so long as there is a plausible relationship between those interests and some statutory objective, whether incidental or intermediate. *See DeLoss v. Dept. of Housing & Urban Development*, 822 F.2d 1460, 1463-66 (8th Cir. 1987); *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 860 F.2d 229, 233-34 (7th Cir. 1988).

The Court of Appeals acknowledged that the decisions of this Court in which persons competitively injured are allowed to advance statutory interests that coincide with their interests "have not rested on any showing of explicit intent to shelter plaintiffs or their like from the hazards of competition." App. 13a.[21] Put simply, under the Court of Appeals' test, the cases of this Court were wrongly decided. That court was thus left to explain decisions by this Court that were rendered anomalous under the standard it was announcing. The Court of Appeals, therefore, hypothesized that the reason this Court has not required evidence of an express congressional purpose to protect petitioner companies from competition was because this Court must have believed that Congress would have been "reluctant to articulate" such a protectionist goal, even if it was really an important influence on Congress' decision to enact the legislation. App. 13a. In the Court of Appeals' view, this Court found standing in these cases on the basis of a presumed (but unmentionable) congressional intention to benefit private commercial interests. *Id.*

In fact, this Court has never dealt with the issue of competitor standing in the terms that the Court of Appeals hypothesized. The explanation for traditional competitor standing, including standing based upon loss of a

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[21] For example, the Court of Appeals noted that "exposure to unwanted competition" was the basis for standing in *Investment Company Institute v. Camp*, 401 U.S. 617 (1971), which involved a challenge to the Glass-Steagall Act. Nothing in the legislative history of the Glass-Steagall Act suggested that it was intended as a piece of competitive protectionist legislation—*i.e.*, to protect investment companies from competition from banks. On the contrary, as this Court described in *Clarke*, the purpose of that Act was to prevent the "possible loss of public confidence in banks and . . . speculation fueled by bank loans for investment purposes." App. 13a, *quoting Clarke*. Nonetheless, this Court had no difficulty finding that investment companies, fearing bank competition, had standing to argue that the regulatory program should have been strictly enforced.

market, rests on a simple premise. Congress is fully aware of the workings of the market and the role that market incentives may play in accomplishing its legislative objectives. Those "whose [market] interests are directly affected by a broad or narrow interpretation of the Act are easily identifiable." *Clarke*, 479 U.S. at 399 n.14, *quoting Data Processing*, 397 U.S. at 157. Congress is generally not blind to those interests.

From Congress' perspective, firms with a direct commercial interest in the implementation of laws imposing statutory requirements upon competitors ought to have standing to participate in the administrative process, and to obtain review to ensure that Congress' statutory intentions are vindicated, for the same reason that they make good participants in the legislative process. The financial interests of those firms create a strong reason for them to advocate forcefully positions of law and fact that might have an influence on the decisionmakers.[22] The fact that there is a pecuniary interest underlying such arguments may cause them to be discounted—but financial interest alone has never been thought to preclude a party from asserting a position. Therefore, while market beneficiaries of a statute may not have been intended as the *primary* beneficiaries of regulatory programs, so long as their financial interest is an expectable and direct consequence of the statute Congress enacts, one can reasonably assume (and *ought* to assume under *Clarke*) that Congress was aware of that impact. Where, as here, the legislative history shows that the commercial interest being asserted was a necessary step toward achieving Congress' ultimate objective (by causing the development of new technology and capacity), there is no basis to apply a test reflecting hostility to that marketplace injury.

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[22] To be sure, those arguments will rarely be phrased in the anti-competitive form: "restrict other firms in order to benefit my narrow competitive interest," but rather in the form "this is good for the Nation and we stand ready to fill the need."

2. The Court of Appeals also had to overcome a second line of cases of this Court involving another form of marketplace injury. *See* App. 15a. Those cases find "prudential standing for those who sell to regulated parties and complain that a regulatory *restriction* will curtail its oppportunities to sell to those parties." *Id.* (emphasis in original). *See United States v. Storer Broadcasting Co.*, 351 U.S. 192, 199-200 (1956); *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 422-23 (1942); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951). In this case, the regulatory actions of the agency seriously curtailed the opportunity of the Treatment Council's members to market their waste treatment services and products.

The Court of Appeals explained these cases in terms of the "non-statutory rights of such parties to deal freely with the regulated firms," embracing the " 'freedom to interact with a third person.' " App. 15a (citations omitted). The Court of Appeals found that the Treatment Council

> plainly lacks any such non-statutory interests. A firm has no common law interest . . . in having the government drive business its way or in having government force competitors' services to be of the same quality (and cost!) as its own.

App. 16a. It is not at all clear, however, why there is any greater common law interest in a "freedom to interact with a third person," than there is in the loss of one's investment, made in reliance on a statute designed to encourage that investment, but which an administrative agency arbitrarily and capriciously fails to implement.

In any case, this Court has never referred to "freedom to interact with a third person" in finding standing. The approach of this Court has been both more practical and more sensible. Where a party's injury is suffered through

dealings with a third-party that is subject to regulation, the expectedness of that result, because it is direct and immediate, may leave little doubt that that party was arguably within the "zone of interests" affected by the statute. In this case, of course, the interest that is often implicit was explicit, for Congress was well aware of market forces and the need to encourage investment in the industry represented by the Treatment Council in order to achieve Congress' ultimate goal of protecting the environment. Congress may properly rely upon such firms to "challenge agency disregard of the law." *See Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

II. THIS CASE RAISES IMPORTANT ISSUES ABOUT THE USE OF PRUDENTIAL RULES TO BAR REVIEW OF ADMINISTRATIVE FAILURES TO IMPLEMENT STATUTORY DIRECTIVES.

The fundamental premise of this Court's decision in *Clarke* was that whatever concerns might prompt a restrictive view of standing in other contexts, the generous remedial provisions of the APA leave little room for the Judicial Branch to create obstructions to review of agency action. *See Clarke*, 497 U.S. at 394-95, 400 n.16. Congress' broad intentions are a reflection of the special purpose that APA review fulfills as a means of assuring the Executive Branch's adherence to Congress' instructions.[23]

A. For 150 years, laws were made almost exclusively through the legislative process, the process contemplated by the Constitution and well-understood by the Framers.

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[23] Thus, while one might be reluctant to hold, in statutory rights cases, that Congress intended to confer the right to bring lawsuits on persons beyond those whom Congress primarily sought to benefit by enactment of a statute, a different presumption applies where review of agency action is at stake. *See Clarke*, 479 U.S. at 400 n.16.

In that open process, the views of an organization like the Hazardous Waste Treatment Council would be welcome. The Treatment Council's financial interest in the outcome of any dispute involving the environmental laws would ensure its advocacy; that advocacy would be especially useful because it would bring expertise born of the marketplace to describe the technical and practical solutions to the problems that Congress perceived.

1. With the advent of administrative agencies and "quasi-legislative" rulemaking, Congress has changed the process for making many of the policy and practical decisions involved in lawmaking as historically understood. As part of the *quid pro quo* for that change of lawmaking venue, Congress has established a procedure, which includes not only a citizen's right to participate in the administrative process, but also a right of judicial review for all those "adversely affected" by the agency's actions. 5 U.S.C. § 702. This element of review was plainly designed by Congress to ensure that the agency's actions, under color of statutory authority, were not in fact inconsistent with Congress' will. And in substituting an administrative process for the legislative process, Congress nowhere expressed any intention to *restrict* the participants in the process. Thus, this Court has repeatedly referred to the "generous review provisions" of the APA and has cautioned that its review provisions "should be construed 'not grudgingly but as serving a broadly remedial purpose.'" *Clarke*, 497 U.S. at 395 (citations omitted). For precisely the same reasons that business groups like the Treatment Council are important participants in the legislative process, they are vital participants in the administrative process as well.

2. In a given case, Congress' intent to preclude review may be inferred from the statutory scheme considered as a whole—for example, "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial

review of those issues at the behest of other persons may be found to be impliedly precluded." *Community Nutrition Inst.*, 467 U.S. at 349. But it is apparent that the basic presumption must go the other way: Consistent with Congress' intent, and with the important purpose served by review of administrative rulemaking, the courts ought to hear challenges to administrative rules by those suffering injury from those rules, *unless* there is some persuasive reason not to. *See City of Milwaukee v. Block*, 823 F.2d 1158, 1166 (7th Cir. 1987) ("Under *Clarke*, we begin with the presumption that parties who meet the requirements of Article III have standing to contest actions by federal administrative agencies").

The restrictive approach of the court below frustrates the implementation of any statutory scheme to which it might be applied. If the position denied a hearing is, in fact, meritorious, then, by definition, the agency has been allowed to flout Congress' intentions. And because the administrative process is an extension of the legislative process, any curtailment of standing tends to distort the process of policymaking that the Framers contemplated, wherein diverse interests would vie against each other through argument and debate.

3. Effective participation in the *administrative* process by groups like the Treatment Council hinges not only on the quality of their arguments, but on their ability to obtain judicial review if their well-founded arguments are ignored. It denies reality to believe that the Treatment Council can remain a viable participant in the administrative process once the courts have held that administrative agencies are free to ignore its advice. But the arguments and expertise provided by groups like the Treatment Council—which, because they are in the business of treating hazardous wastes, have knowledge vital to fulfilling the goals that Congress set for the agency—are precisely the arguments and expertise that the agency needs in order to perform its statutory mission success-

fully. The courts should be reluctant to exclude from judicial review of agency action persons whose vigorous participation in the administrative process is plainly essential.

B. The test announced by the Court of Appeals in this case tends to involve the courts in subjective judgments about who should be allowed to argue what in the courts.

1. Of course, the first prong of the test—whether Congress expressly intended to benefit the would-be plaintiff—is similar to the kinds of inquiries that courts ordinarily make. But as applied by the Court of Appeals in this context, it leads to absurdly restrictive results—as this Court's rejection of the "express benefit" test in *Clarke* recognized. As explained above, the Treatment Council and its members, because of the business they are in—environmental protection—necessarily benefit when Congress passes laws better to protect the environment. Indeed, Congress has quite consciously promoted the development of such an industry as a necessary step to the accomplishment of its environmental goals. Yet, in this case, the Court of Appeals found the *express* intended beneficiaries of the lofty environmental laws to be only "consumers," notwithstanding statutory language and legislative history demonstrating that the waste treatment industry was also to be enhanced and expanded to achieve the legislative goals. At the same time, the Court of Appeals recognized that even on silent legislative records, in regard to other statutes, this Court has had little difficulty finding that parties suffering competitive injury would indeed have standing. The distinction is intuitive at best. It would appear far more reasonable to presume that an industry or group that would, in fact, directly and predictably benefit from the passage of a statute was at least *among* those that Congress sought to benefit.

2. The second prong of the test announced by the Court of Appeals—whether the parties seeking review

"would be unusually suitable champions of Congress's ultimate goals"—is entirely subjective. The court below found that the Treatment Council was *not* an "unusually suitable champion" of Congress' ultimate goals, despite the facts that (1) Congress relied on, and sought to encourage the expansion of the treatment industry in order to secure a safe environment; (2) Congress has historically relied upon firms suffering competitive injury to pursue challenges to administrative regulations; (3) the Treatment Council's interests in providing advanced forms of hazardous waste treatment, and added capacity, appear entirely congruent with the statutory objectives; and (4) the Treatment Council and its members have the incentive to advance their arguments informatively, and the special expertise vital to intelligent decisionmaking in the field. Under these circumstances, the court's determination that the Treatment Council did not meet its burden of showing that it was an "unusually suitable champion" demonstrates that this new test of standing will invariably turn more upon the predisposition of appellate panels than upon Congress' intent.

3. Apparent as well is the unseemly charade that this type of ruling produces. The inevitable effect of a ruling like this is to require an organization like the Treatment Council to modify the composition of its membership so that it can acquire "standing" to participate in the administrative and judicial processes that are essential to its economic survival. Predictably, injured organizations which find themselves excluded by ill-conceived prudential rules of standing will seek to bring within their membership, or ride the coattails of, persons whose interest in the outcome of particular disputes is more to the particular court's liking.[24]

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[24] Excessive vigilance in applying prudential rules to forestall review of agency laxity embroils the courts of appeals in procedures to which they are poorly suited. In both of these cases, the orders of the court below required the submission of hosts

Commenting upon the search for sufficiently suitable beneficiaries engendered by harsh "prudential" rules of standing, this same Court of Appeals in *Control Data Corp. v. Baldrige*, 655 F.2d 283 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981), commented upon the process it was creating:

> We are not unmindful of the quality of fantasy or play in the search for beneficiaries. "Litigants search for a personality that will fit the demands of the court, tailor their attributes, paint their faces, manipulate their identities . . . ." We do not believe it is our place, however, to call a halt to this "masked ball."

655 F.2d at 297 n.28 (citation omitted).

With this Court's express disapproval of the rule established by the Court of Appeals in *Control Data*, this Court seemed to put an end to the "masked ball." *See Clarke*, 479 U.S. at 395. The decision below restores it.

C. The same financial interests that provide the incentive to participate in administrative and judicial proceedings also create the financial ability to participate effectively. The environmental organizations that the Court of Appeals apparently viewed as "suitable champions" of Congress' environmental objectives frequently lack the financial resources to pursue all matters of concern to them, no matter how important the issue is, or how far from the requirements of law the agency has strayed. Public interest groups frequently rely upon businesses with *commercial* interests coincident with their own to take the laboring oar in helping to assure that the environmental laws are properly and informatively en-

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of affidavits and counter-affidavits designed to illuminate with precision the way in which the Treatment Council and its members were affected by the agency's regulations, as well as their relationship to the overall objectives of the Act. The inappropriateness of such evidentiary exchanges in the courts of appeals (in pursuit of self-created prudential standards, rather than standards required by the Constitution or by Congress) should be apparent.

forced. Indeed, similar reliance and alliances have been formed throughout the Nation's history in an effort to influence public policy. Thus, an important means of ensuring agency compliance with environmental law has been cut off, to the detriment not only of the business organizations that will suffer financial injury, but to the detriment of the very consumer groups that even the court below recognized were intended to be benefited by these Acts.

III. THE REJECTION OF PETITIONER'S INTEREST AS A BASIS FOR OBTAINING JUDICIAL REVIEW CREATES A SIGNIFICANT OBSTACLE TO THE IMPLEMENTATION OF THE ENVIRONMENTAL LAWS AND UNNECESSARY CONFUSION IN THE LAW OF "STANDING."

As demonstrated above, the decision of the Court of Appeals in these cases is flatly inconsistent with the basic premises of this Court's recent cases. By purporting to find internal tensions in *Clarke* sufficient to warrant the creation of a special review-limiting test, the analysis of the court below creates obstacles to judicial review that a straightforward reading of *Clarke* precludes. Other circuits have had little difficulty applying *Clarke*'s "plausible relationship standard" in similar cases without any need to reverse the presumption or to require the petitioner to show he is an "unusually suitable champion" of Congress' goals. Applying *Clarke* directly, those courts have reached results directly at odds with the decision below. *See, e.g., DeLoss*, 822 F.2d at 1462-66; *Foremost*, 860 F.2d at 232-34; *Block*, 823 F.2d at 1164-67.

The obstacles to judicial review created by this decision—directed to situations where businesses are seeking *more* effective implementation of laws protecting the health and safety of citizens—are of vital importance to the overall scheme of enforcement of the environmental laws. This ruling—by the court possessing *exclusive* appellate jurisdiction over many of the major federal en-

vironmental statutes [25]—tends to shut out of the administrative process, as well as the judicial review process, the businesses that have the incentive and the financial ability to pursue environmental objectives, and the special expertise to contribute meaningfully to the debate. As such, the decision will have (and is already having) a profound effect on the citizenry's ability to ensure administrative vigor, adherence to the congressional plan, and informed decisionmaking in the implementation of the environmental laws.

Here, Congress recognized that the development of industrial capacity and effective technology to treat hazardous wastes was necessary to achieve its ultimate aims. The Court of Appeals' determination that these interests are unworthy of protection in the courts, and its refusal even to hear the arguments of firms asserting such interests, denigrates and frustrates Congress' substantive aims under the guise of a standing determination. In a case like this, where the interest being asserted is important to achieving Congress' ultimate objectives, the denial of standing means that one of *Congress'* own interests are to be denied a voice in the administrative process.

Beyond its effect on environmental enforcement, however, the decision below has added unnecessary confusion to an area of the law that deserves some certainty—and appeared to achieve it with *Clarke*. To be sure, as the concurring opinions in *Clarke* pointed out, the *result* in *Clarke* might have been explained by a narrower holding—*e.g.*, that Congress specifically intended to foster the competitive interests of the would-be plaintiff in that case. *See Clarke*, 479 U.S. at 409-417 (concurring opinions). But if *Clarke*'s clear explanation of the rule is now to be dismissed as dictum, then that is something that this Court should declare. On the other hand, if *Clarke*'s description of the analysis to be applied is to

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[25] *See* note 10 *supra*.

be taken seriously, then it is important that it be applied to cases like this.[26]

The recurring fact pattern of this case—involving commercial injury when the underlying statute is ultimately intended to foster some loftier goal—makes this case especially appropriate for resolving any ambiguity left by *Clarke*. But if *Clarke*'s careful explanation of the standards for obtaining review of administrative decisions is now to be dismissed as ambiguous, then businesses whose immediate interests are at stake in agency proceedings, but who would be denied review under the rule announced below, should be told. Such businesses and business groups will have to restructure themselves (to attend the "masked ball") so that they will be allowed to present the arguments that they must present if they are to survive in the face of agency failures to implement the laws on which they depend for their livelihood.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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March 17, 1989

[26] As this Court itself observed in *Clarke*, the Court's standing jurisprudence under the Administrative Procedure Act has not always been "self-explanatory." *Clarke*, 479 U.S. at 396. Despite the deliberate effort in *Clarke* to clarify that jurisprudence, the premises and purposes of the "zone of interest" test apparently remain so obscure that it leads—in at least this court of appeals—to the creation of new, supplemental tests that take on jurisprudential lives of their own.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 7, 1988 Decided October 7, 1988

No. 86-1143

HAZARDOUS WASTE TREATMENT COUNCIL,
Petitioner

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents

EDISON ELECTRIC INSTITUTE, *et al.*,
Intervenors

[*HWTC II*]

Petition for Review of an Order of the
Environmental Protection Agency

David R. Case for petitioner. *Ridgway M. Hall, Jr.* also entered an appearance for petitioner.

Steven E. Silverman, Attorney, Environmental Protection Agency, with whom *Roger J. Marzulla*, Acting Assistant Attorney General, and *Brian V. Faller*, Attorney, Department of Justice, were on the brief, for respondents.

William R. Weissman, with whom *Toni K. Allen* was on the brief, for intervenors Edison Electric Institute, et al. *Sue M. Briggum* and *Douglas H. Green* also entered appearances for intervenors.

Before BUCKLEY and WILLIAMS, *Circuit Judges*, and EDWARD D. RE,* *Chief Judge*, U.S. Court of International Trade.

Opinion Per Curiam.**

PER CURIAM: The Hazardous Waste Treatment Council petitions for review of the Environmental Protection Agency's rules concerning burning of hazardous wastes, including used oil, as fuel. Petitioner attacks the rules because they (1) fail to regulate generators, transporters, and others who deal with used oil, (2) insufficiently regulate used oil that exhibits the characteristics of a hazardous waste, (3) regulate under the used oil (rather than the hazardous waste) rules those who generate a small quantity of hazardous waste and mix it with used oil, (4) permit circumvention of the rules by the dilution of used oil with virgin oil, and (5) fail to regulate certain combustion residuals resulting from the burning of hazardous waste fuels. We conclude that petitioner has representational standing to raise all but the last challenge. On the merits, we uphold the regulations petitioner had standing to challenge as reasonable constructions of the statute.

I. BACKGROUND

A. Statutory and Regulatory Background

The statutory and regulatory treatment of hazardous wastes in general and used oil in particular is described more fully in a companion case, *Hazardous Waste Treatment Council v. EPA*, No. 86-1658 (*"HWTC I"*) issued today. Subtitle C of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6921-6939a (1982 & Supp. III 1985), establishes a comprehensive

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* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1982).

** Judge Williams authored Part II.A. dealing with standing. Judge Buckley authored the balance of the opinion.

scheme to regulate hazardous wastes. This scheme applies when the Environmental Protection Agency ("EPA" or "Agency") identifies ("lists") a substance as a hazardous waste, or when a substance exhibits one of the technical characteristics of hazardousness developed by the EPA. *See id.* at § 6921(b); 40 C.F.R. §§ 261.10-.11 (1987) (criteria for listing); *id.* at §§ 261.20-.24 (characteristics of hazardous wastes).

Congress supplemented the RCRA by requiring the EPA to promulgate standards for hazardous waste burned as fuel, whether the hazardous waste is burned alone or in combination with another substance. 42 U.S.C. § 6924(q)(1) (Supp. III 1985).

Congress also directed the EPA to deal with used oil. Section 7 of the Used Oil Recycling Act of 1980 ("UORA"), Pub. L. No. 96-463, 94 Stat. 2055 (codified as amended at 42 U.S.C. § 6935(a) (Supp. III 1985)), authorizes the Agency to regulate recycled oil, whether or not it classifies such oil as hazardous under subtitle C of the RCRA. (Recycled oil includes used oil that is burned, the subject of the challenged regulations. 49 U.S.C. § 6903(37) (1982).) In 1984, Congress directed the EPA to determine whether to list used oils as hazardous wastes. 42 U.S.C. § 6935(b) (Supp. III 1985). If it listed any, the Agency was to promulgate special regulations for the generators, transporters, and recyclers of used oil. *Id.* at §§ 6935(c) & (d). In *HWTC I*, we overturned the EPA's decision not to list any recycled oils as hazardous under section 6935(b).

Finally, 42 U.S.C. § 6921(d)(4) (Supp. III 1985) permits the EPA to exercise its discretion whether to regulate those who generate 100 kilograms or less of hazardous waste per month.

B. Agency Action

The final rule that petitioner challenges, 50 Fed. Reg. 49,164 (1985) (codified at 40 C.F.R. pts. 261, 264-66,

271) establishes two general categories for used oil that is burned for energy recovery. The first category is *hazardous* oil, which is defined as used oil deliberately mixed with hazardous waste. Hazardous oil is regulated in the same manner as any other hazardous waste fuel. 50 Fed. Reg. at 49,175-78; *see* 40 C.F.R. pt. 266, subpart D (1987) (hazardous waste fuel regulations). Used oil that contains 1,000 parts per million ("ppm") of total halogens is presumed to be hazardous oil. The presumption can be rebutted by the holder of the oil. 40 C.F.R. § 266.40(c). All other used oil is classified simply as *used* oil, even if it has acquired the characteristics of hazardous waste in the course of its normal use. *Id.* at § 266.40(d). (We shall refer to this category as "regulated used oil.")

The Agency has promulgated a variety of specifications for regulated used oil relating to characteristics such as ignitibility and the concentration of certain contaminants. *Id.* at § 266.40(e). "Specification" oil (oil that meets the specifications) is subject only to analysis and recordkeeping requirements. *Id.* & § 266.43(b). "Off-specification" oil may be burned only in certain types of industrial boilers, *id.* at § 266.41; marketers and industrial burners must comply with certain administrative requirements, *id.* at §§ 266.43-.44. The EPA permits off-specification oil to be mixed with previously unused ("virgin") oil so as to dilute the contaminant concentration and thus meet the specifications. 50 Fed. Reg. at 49,187-88.

The rules also deal with so-called small quantity generators, i.e., those which produce 100 kilograms or less of hazardous waste per month. The Agency has determined that such wastes ordinarily will not be regulated, 51 Fed. Reg. 10,146, 10,153 (1986) (codified as amended at 40 C.F.R. § 261.5 (1988)), and that determination has not been challenged. When these wastes are combined with used oil, however, the mixture is treated only

as regulated used oil. As such, it is not subject to the more stringent regulations applicable to other hazardous waste fuels.

Finally, the Agency concluded that under the Bevill Amendment, 42 U.S.C. § 6921(b)(3), residues from burning habardous waste fuels in mining furnaces and cement kilns would be exempt from regulation, as would residues from coal-burning utility boilers in which hazardous waste was fifty percent or less of their fuels.

II. Standing and Jurisdiction

A. Standing

The Hazardous Waste Treatment Council is a national trade organization of firms engaged in the treatment of hazardous waste and the manufacture of equipment for that purpose. The gist of its complaint here is that EPA's regulations are not comprehensive and strict enough to comply fully with the controlling statute, RCRA. Concerned with the apparent anomaly of regulated entities demanding stricter regulation, we requested the parties to brief the issue of standing. Besides its brief, the Council has submitted the affidavits of its executive director and also of executives of five member companies.

We conclude that the Council has standing insofar as it represents members on whom regulatory laxity may inflict environmental injury; we reject standing for it as representative of firms that may suffer competitive loss because EPA has not forced on their competitors as demanding (and expensive) techniques as they themselves employ.

1. *Allegations as to Standing.*

The Council's member firms operate facilities in 48 states. They provide treatment or disposal services employing both established and emerging technologies and

methods for treatment and management: incineration and other thermal destruction, reclamation, biological and chemical treatment, land disposal after pre-treatment, and hazardous site cleanups. A number of member companies are engaged in the reclamation of used oil, the blending of used oil for use as industrial fuel, and the treatment and disposal of used oil.

The Council's Articles of Incorporation declare that among its purposes is

> To promote the protection of the environment through the adoption of environmentally sound procedures and methods of destroying and treating hazardous wastes and the proper management of residues of those treatment and destruction processes.

The affidavits submitted by the Council and various members reveal the members' varied relations to the substantive issues raised in this case. We can identify three different types:

a. *Competitor claims.* At least three members claim that the asserted laxity of the regulations will diminish the market for their high-tech control services. (CF Systems Corporation, Swatz Affidavit; SYSTECH Corporation, Eifert Affidavit; Ross Environmental Services, Stiff Affidavit.) Firms with contaminated used oil on hand will, they argue, be free to re-use that oil without either using the treatment services of Council members or incurring the expense of themselves providing the high-quality treatment that Council members offer. (Alternatively, such firms may sell the contaminated used oil to others for their use, again without either using the services of these Council members or incurring comparable costs.) As a result, the market for the services of these members of the Council will be smaller than it would have been if the EPA had adopted the Council's views. The affidavit of the Council's executive director, Richard C. Fortuna, refers solely to this injury.

Ross and yet another company (ThermalKEM) assert a variation on this claim. The variation requires special mention because it is the sole injury that the affidavits appear to link to the Council's "Bevill Amendment" claims (contentions that the EPA has given too broad a construction to the exemptions provided by that Amendment). These companies incur substantial costs for the disposal of ash from their own incineration facilities, costs evidently mandated by existing regulation. As a result of EPA's broad definition of the Bevill Amendment, certain utilities and smelters—"Bevillized facilities," as they put it—will be free to generate ash without incurring comparable costs. Thus the EPA's ruling evidently deprives Ross and ThermalKEM of a potential market. Moreover, to the extent these member firms compete with Bevillized facilities as sellers of items produced with hazardous wastes, the EPA ruling tends to enable the Bevillized competitors to undersell them.

b. *Consumer claims.* BVER Environmental asserts that it is in the business of receiving non-hazardous used oil from heavy manufacturing industries for processing and resale as boiler fuel. It claims that its receiving facilities are injured when it receives adulterated or contaminated used oils, and that it is expensive to test every tankload. Receipt of a single 5,000-gallon contaminated tankload may cause it to lose as much as $100,000. More stringent EPA regulations would tend to protect it from this sort of injury. (Policow Affidavit.)

c. *Claims of supply diminution.* Affidavits filed by several members assert that the alleged regulatory laxity will cause their *supply* of contaminated used fuels to be diverted elsewhere. (SYSTECH Corporation, Eifert Affidavit; Ross Environmental Services, Stiff Affidavit; ThermalKEM Inc., Zeigler Affidavit.) These affidavits make no effort to explain how regulatory laxity reduces supply in any normal sense of the word. So far as we are able to discern, these claims must fit into one of the

two categories discussed above. Either the firms suffer because there is less demand for their services or because the oils they receive are less pure. Accordingly, we drop these allegations from any separate consideration here.

2. *Application of Standing Principles.*

It is a commonplace that standing encompasses two components: constitutional and prudential. For constitutional standing, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). For prudential standing, a plaintiff usually must show, in addition, that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question," *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). Under the zone of interests test, the "essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.'" *Clarke v. Securities Industry Ass'n*, 107 S. Ct. 750, 757 (1987). (An alternative basis for prudential standing, resting on non-statutory interests, is also considered below.) The problem here lies with prudential standing.

a. *The consumer claims.* We have no difficulty finding that the consumer interests represented by the Council are entitled to standing. According to the affidavit of the affected member company's executive, it suffers direct losses as a recipient of contaminated used oils. That the injury is commercial is no obstacle. "[S]neering at [commercial] gains by adding 'mere' to them does not make them go away." *United States Department of the Air Force v. FLRA*, 838 F.2d 229, 233 (7th Cir. 1988). Owners of a lake who licensed

its used by fishermen and boaters would surely have standing to attack regulatory laxity that led to increased water pollution; there appears no principle by which one could reasonably distinguish the injury alleged here.

We will address below the problem of whether the *Council* is an appropriate representative of the consumer interests of BVER.

b. *The competitor claims.* The Council's competitor claims appear quite similar to those asserted in *Calumet Industries, Inc. v. Brock*, 807 F.2d 225 (D.C. Cir. 1986). There the petitioners objected to the Occupational Safety and Health Administration's decision to adopt a narrow definition of the class of oils that vendors were required to label as health hazards. Petitioners' oils indisputably required such labelling. We found that "the interest to be protected by the OSH Act is worker safety . . . and *not* business profits" and consequently held that "[a]s petitioners here [did] not come before us as protectors of worker safety, but instead as entrepreneurs seeking to protect their competitive interests, we think it plain they lack standing." *Id.* at 228 (emphasis in original).

Here, however, the Council asserts that its interests, though pecuniary, are in sync with those sought to be served by RCRA. In essence they suggest that tightening of environmental standards will generally foster not only a cleaner environment but also the member companies' profits, as it will expand the market for their services.[1]

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[1] As its executive director notes, the Council

> is unique in that it represents firms whose economic interests and future viability depend on the presence, not the absence, of appropriate regulations for the protection of the environment which create the demand for their advanced waste treatment and management services. . . . Thus the linkage between effective implementation and enforcement by EPA of regulatory programs under RCRA, increased protection of human health and the environment, and increased use of the waste treatment services provided by the HWTC member companies is a direct

The Supreme Court's decision in *Clarke* leaves the status of this sort of incidental benefit somewhat unclear. *Clarke* explained that the zone of interests "test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff. *Investment Company Institute, supra* [401 U.S. 617 (1971)]." 107 S. Ct. at 757 (footnotes omitted).[2] On the other hand, it said the test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* We must thus find operational meaning for a test that demands less than a showing of congressional intent to benefit but more than a "marginal[] rela[tionship]" to the statutory purposes.

The answer may lie in presumptions revolving around the congressional intent to benefit. Where that intent is plain, we may entertain a presumption of standing—a presumption that can be overcome by, for example, a finding that suit by intended beneficiaries would "severely disrupt [a] complex and delicate administrative scheme." *Block v. Community Nutrition Institute*, 467 U.S. 340, 348 (1984), quoted in *Clarke*, 107 S. Ct. at 757. In the absence of apparent congressional intent to benefit, however, there may still be standing if some factor—some

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one. HWTC exists to represent the collective interest of its member companies in proper environmental control.

Fortuna Affidavit at 2-3.

[2] It further observed that our decision in *Control Data Corp. v. Baldrige*, 655 F.2d 283, 293-94 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981), to the extent that it "suggests otherwise," is "inconsistent with our understanding of the zone of interest test, as now formulated." *Id.* at 757 n.15. We followed *Control Data* in *Glass Packaging Inst. v. Regan*, 737 F.2d 1083 (D.C. Cir.), *cert. denied*, 469 U.S. 1035 (1984), and *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*, 679 F.2d 951 (D.C. Cir. 1982), which are presumably condemned to the same extent.

indicator that the plaintiff is a peculiarly suitable challenger of administrative neglect—supports an inference that Congress would have intended eligibility. *Cf. Haitian Refugee Center v. Gracey*, 809 F.2d 794, 812-13 (D.C. Cir. 1987) (pre-*Clarke* case stating that the initial inquiry is whether "from the face of the statute" the interest was arguably intended to be protected or regulated, but that clear evidence in the legislative history of intent to afford or deny standing may rebut the initial answer).

Here the Council points essentially to Congress's indisputable intent to encourage proper disposal and recycling of hazardous wastes. See, e.g., 42 U.S.C. §§ 6901(a)(4), 6902(a)(6). But that intent, of course, shows neither that Congress intended to benefit recycling and disposal firms nor that such firms' interests are more than "marginally related" to Congress's environmental purposes. Whenever Congress pursues some goal, it is inevitable that firms capable of advancing that goal may benefit. If Congress authorized bank regulators to mandate physical security measures for banks, for example, a shoal of security services firms might enjoy a profit potential—detective and guard agencies, manufacturers of safes, detection devices and small arms, experts on entrance control, etc. But in the absence of either some explicit evidence of an intent to benefit such firms, or some reason to believe that such firms would be unusually suitable champions of Congress's ultimate goals, no one would suppose them to have standing to attack regulatory laxity. And of course a rule that gave any such plaintiff standing merely because it happened to be disadvantaged by a particular agency decision would destroy the requirement of prudential standing; any party with constitutional standing could sue.

It is worth remembering that judicial intervention may defeat statutory goals if it proceeds at the behest of interests that coincide only accidentally with those goals. The companion case, *Hazardous Waste Treatment Coun-*

cil v. EPA, No. 86-1658, illustrates the risk that the interests may diverge significantly. There EPA refused to list certain types of used oil as hazardous wastes because it thought this would have the boomerang effect of increasing illegal dumping and thus would result in net harm to the environment. Although the court finds that Congress did not authorize the EPA to consider such an effect, it is a perfectly plausible one. See Martin T. Katzman, From Horse Carts to Minimills, 92 *The Public Interest* 121, 132 (Summer 1988) (discussing effect of expectation that EPA would list as hazardous waste oil from dismantled cars). When we grant standing to a party with only an oblique relation to the statutory goal, we run the risk that the outcome could, even assuming technical fidelity to law, in fact thwart the congressional goal. Further, of course, technical fidelity to law cannot be assumed; judges err.

The risk is present here as well. A regulatory extension sought by the competitor interests in the Council might benefit recyclers' profits (e.g., by forcing the use of more advanced recycling techniques) but harm the environment (because, for example, its cost might lead to substitution of more environmentally harmful fuels).

In the absence of any suggestion either of congressional intent to improve the competitive position of high tech recyclers, or of any reason to picture such firms as suitable challengers of the agency, we believe those interests to be outside the critical zone.

Of course there are many cases allowing standing to firms whose sole concern is exposure to unwanted competition. For example, the Supreme Court has in a series of cases found standing for competitors claiming to be adversely affected by the Comptroller of the Currency's permissive interpretations of the statutes restricting the activities of national banks. See *Clarke*, 107 S. Ct. 750; *Investment Company Institute v. Camp*, 401 U.S. 617 (1971); *Association of Data Processing Service Or-*

ganizations, Inc. v. Camp, 397 U.S. 150 (1970). And, in accordance with *Clarke*'s abjuration of any requirement of congressional intent to benefit, these have not rested on any showing of explicit intent to shelter plaintiffs or their like from the hazards of competition. See, e.g., *Investment Company Institute*, 401 U.S. at 629-34 (reviewing goals of Glass-Steagall Act).

The Court may have inferred congressional approval of such challengers on the view that those whom Congress explicitly sought to benefit would make relatively unsuitable plaintiffs. For example, it is hard to picture a person or firm that could assert injury in the form of "the dangers of possible loss of public confidence in banks and the danger to the economy as a whole of speculation fueled by bank loans for investment purposes," 107 S. Ct. at 756-57 n.13 (summarizing *Investment Company Institute*'s analysis), said to have been a key evil that the Glass-Steagall Act sought to avert. By contrast, of course, competitors suffer sharp, clear losses when banks invade forbidden territory. To some extent, moreover, the Court may tend simply to assume, without evidence, that entry-restricting legislation is intended to shelter competitors, as legislators might be peculiarly reluctant to articulate a goal of sheltering competitors, no matter how influential it may be. *Cf. Panhandle Producers v. Economic Regulatory Admin.*, 822 F.2d 1105, 1109 (D.C. Cir. 1987) (attributing the success of competitors in securing standing to enforce entry-restricting licensing statutes to a substantial congruence between such firms' interests and "a statutory purpose to restrict entry," evidenced in part by such statutes' typical origin in the competitor firms' political efforts).

The Council here seeks to bring itself under these cases by identifying RCRA as an "entry-restricting" statute—aimed at excluding from the market providers of less excellent treatment services. But any pecuniary

beneficiary of a regulatory program could so characterize it; to accept the characterization as a basis for standing would eliminate the prudential standing requirement. As the consumers of the environmental purity afforded by RCRA seem highly suitable champions of enforcement, and we find no clue of congressional intent to rely on other champions, we find the entry-restriction cases inapplicable.

Nor does the fact that RCRA exposes some of the activities of petitioner's members to regulation afford the Council prudential standing. A party is "regulated" for purposes of the "zone" test only if it is regulated by the particular regulatory action being challenged. In *Calumet Industries, Inc. v. Brock*, 807 F.2d 225 (D.C. Cir. 1986), where petitioners were clearly subject to the enabling act itself, we found that they lacked standing because they were "not directly regulated by the rulings being challenged in this case. Rather, a more appropriate description is that [they] operate[] in an industry which is regulated by the rulings but do[] not operate in that sphere of the industry which is the object of the regulation." 807 F.2d at 229 (quoting *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 143 n.82 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978)).

It is possible that some of the regulations adopted here apply to some members of petitioner. But in view of the nature of petitioner's claim, that does not render *Calumet* any less relevant. Petitioner wants to increase the regulatory burden on others. Its interest lies in the competitive advantage that its members might secure if the government imposed higher costs on other firms. As noted above, that interest carries a considerable potential for judicial intervention that would distort the regulatory process. As in the prior analysis, we see no special reason to suppose that Congress might have thought them suitable advocates of the environmental interests underlying the statute.

Finally, we must consider a line of cases finding prudential standing for those who sell to regulated parties and complain that a regulatory *restriction* will curtail its opportunities to sell to those parties. See, e.g., *National Cottonseed Products Ass'n v. Brock*, 825 F.2d 482 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1573 (1988); *FAIC Securities, Inc. v. United States*, 768 F.2d 352 (D.C. Cir. 1985). In *FAIC Securities* then-Judge (now Justice) Scalia endeavored to reconcile the cases seeming to revolve around such a principle. His discussion focused primarily on some conflicting clues among the precedents, but in a footnote he suggested an underlying logic to the cases: the value of judicial protection for the non-statutory rights of such parties to deal freely with the regulated firms:

> We salute in passing Professor Monaghan's recent admirable effort to bring coherence to the vendor-vendee cases by analyzing them as properly first-party standing cases, seeking to vindicate a "freedom to interact with a third person." Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 299 (1984). If we understand his analysis correctly, it would lead to a conclusion of standing here. "[I]t seems plain that either party to a regulated transaction can challenge any limitation in first party terms, because for each party the claim takes the following form: the state has advanced no sufficient interest to justify prohibiting this interaction." *Id.* at 303 (footnote omitted).

768 F.2d at 360 n.5. See also *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 422-23 (1942) (broadcasters have standing to challenge regulations that interfere with ability to contract with radio station owners whose licenses would be jeopardized by continuing relations with broadcasters); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 188-200 (1956)

(same); *Joint Anti-Fascist Refugee Committee v. Mc Grath*, 341 U.S. 123 (1951).

The Council plainly lacks any such non-statutory interests. A firm has no common law interest, much less a constitutional one, in having government drive business its way or in having government force competitors' services to be of the same quality (and cost!) as its own.

c. *The Council as representative of BVER's consumer interest.* Having concluded that the consumer interest of BVER (and any other member companies similarly situated) is sufficient for standing, but that the competitor interests of member companies are not, we must consider whether the Council has standing as a representative of the former. As *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), frames the issue, it is whether "the interests [the association] seeks to protect are germane to the organization's purpose."

The Council's Articles of Incorporation say that it aims [among other things] to "promote the protection of the environment through the adoption of environmentally sound practices and methods of destroying and treating hazardous wastes." We have no doubt of its bona fides; one may fervently hope to do good even if he expects to do well in the process. Further, while the fit between Congress's environmental goals and the Council members' competitive ones is not tight enough for the latter to afford the Council standing, the germaneness test is relatively loose. As recently construed by this court, it requires "mere pertinence between litigation subject and organizational purpose." *Humane Society of the United States v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988).[3] While

[3] See also *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1502-04 (D.C. Cir. 1988) (*en banc*) (separate opinion of Judge Mikva); but see *Hotel & Restaurant Employees Union, Local 25 v. Attorney General*, 804 F.2d 1256, 1276 (D.C. Cir. 1986) (separate opinion of Judge Silberman) (suggesting that the

the Council's stated devotion to the environment does not excuse it from having to show a specific injury to the members' environmental interests, it does suggest that BVER's interest is germane to the Council's purposes.

There remains this problem: HWTC's *primary* interests have a quite different focus from BVER's interest in *consuming* relatively clean used oil. In Fortuna's affidavit, for example, there is not a single reference to HWTC members' interests as consumers; the entire focus is on their interest in having EPA create a market for their services—with higher technology and at higher cost. Does the potential split between those and the Council members' interest as environmental consumers render the latter non-"germane" under *Hunt?*

Under this court's application of its "pertinence" test in *Humane Society of the United States v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988), the potential split appears no bar. The court had identified as sufficient for standing the Humane Society's members' aesthetic interests in seeing animals and birds on wildlife refuges, and in not seeing animal corpses and environmental degradation. The Society's articles of incorporation spoke exclusively of the protection of all living things "(presumably for their own intrinsic worth)," *id.* at 53, but nothing of the human interest in seeing these living things. The court found the relationship sufficient under its "pertinence" test. *Id.* at 59-60.

The interests found within the "zone" in *Humane Society* are ones that normally, but not invariably would be seen as part of the broader goal to which the Society was explicitly committed. But one can imagine conflicts: optimal life for a species might require seclusion from human viewers. Indeed the court recognized the potential

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rights vindicated must be "the sort of rights that by their *nature* relate to a particular organization"), *vacated and aff'd en banc by equally divided court* in the decision cited immediately above.

conflict, but read prior cases to preclude its being treated as an obstacle to the Society's standing. *Id.* at 59-60 n.25. There is clearly some tension between this relaxed rule and the prudential insistence that the parties have interests within the statutory goals: if suits by parties with interests outside or at odds with those goals may lead a court to interventions that fail to advance those goals, then so may suits by internally conflicted organizations. But perhaps the duty of the association's directors to represent all elements fairly is thought to mitigate the risk. In any event, under *Humane Society* the Council appears to be an adequate representative of the BVER environmental consumer interest.

d. *The Council's standing in its organizational capacity.* The Council argues that EPA's alleged illegalities impinge upon a number of its organizational interests: they "damage the public trust in, and acceptability of, responsible treatment businesses and technologies"; by defeating its efforts to bring about proper management of used oils, EPA's illegalities diminish the Council's "ability to attract new members and retain existing members"; they diminish its ability "to refer potential customers who need treatment services . . . to member companies"; and, as the challenged decisions exempt certain generators, collectors and blenders from reporting requirements, the illegalities thwart the Council's "ability to obtain information necessary for its educational and promotional activities." HWTC's Supplemental Brief Regarding Prudential Standing at 13-14.

Assuming *arguendo* that these injuries satisfy the constitutional component of standing, all one need say here is that the Council has made no effort whatever to link them to the statutory purposes. Of course RCRA seeks to improve the environment, and, as we have noted, promotion of environmental quality is among the goals of the Council. In the Council's view, this general coincidence of goals should suffice to bring the Council's or-

ganizational interests within prudential standing requirements: any decision that disadvantages the Council thwarts RCRA. But plainly this is not enough. If it were, persons with only a "generalized grievance[]," concededly insufficient for standing, see *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974), court simply form an organization to advance their grievance, and, whenever an agency decision offended their position, secure standing by asserting that it had thrown practical roadblocks in the way of the organization's success. See *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 813-14 (D.C. Cir. 1987) (citing cases).

We find that the Council has standing as the representative of BVER's consumer environmental interests. These interests do not encompass the Council's Bevill Amendment contentions, which accordingly we do not reach.

B. Jurisdiction

Our appellate jurisdiction is premised on 42 U.S.C. § 6976(a)(1) (1982), which authorizes review under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1982), of "final regulations" and the "denial of any petition for the promulgation . . . of any regulation . . . ." We recently interpreted this provision in *United Technologies Corp. v. EPA*, 821 F.2d 714, 721 (D.C. Cir. 1987). The Environmental Defense Fund ("EDF") challenged an EPA rule regulating certain waste management units because it failed to implement the statutory directive to regulate more comprehensively. EDF did not challenge the regulations actually promulgated but argued that the Agency should have promulgated a different rule. We dismissed the petition for lack of jurisdiction because it was not a challenge to the promulgation or denial of a petition to promulgate any rule. Had EDF petitioned the Agency to promulgate the rule under 42 U.S.C. § 6974 (1982), it could have sought review if the petition had been denied.

United Technologies disposes of petitioner's challenge to the scope of the rules. Petitioner claims the rules do not go far enough because they fail to regulate generators and transporters of used oil, as well as facilities that store and blend used oil. Like EDF, petitioner argues that the Agency should have promulgated rules that it has not promulgated.

Petitioner seeks to escape the force of *United Technologies* by characterizing its argument as a challenge to the regulations as promulgated. But an agency's failure to regulate more comprehensively is not ordinarily a basis for concluding that the regulations already promulgated are invalid. "The Agency might properly take one step at a time." *United States Brewers Ass'n v. EPA*, 600 F.2d 974, 982 (D.C. Cir. 1979). Unless the agency's first step takes it down a path that forecloses more comprehensive regulation, the first step is not assailable merely because the agency failed to take a second. The steps may be too plodding, but that raises an entirely different issue over which the district courts might have exclusive original jurisdiction. 42 U.S.C. § 6972(a) (1982 & Supp. III 1985); *Sierra Club v. Thomas*, 828 F.2d 783, 787-92 (D.C. Cir. 1987). Petitioner does not claim such a delay.

Petitioner's basic argument is that the promulgated regulations "fail to include necessary requirements" of the statute—not because the EPA ignored a factor that the statute requires it to consider, but only because it has not fully implemented the statutory goal. We lack jurisdiction over that claim.

III. Standard of Review

In reviewing an agency's construction of its governing statute, we first ask whether Congress has spoken to the precise question at issue. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). If so, we must enforce that unambiguously expressed intent. *Id.* at 842-43. Congress'

intent is determined in the first instance by examining the "particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988). If the language and structure of the statute express a clear intent, we ordinarily will not examine the legislative history. "Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.'" *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 107 S. Ct. 1855, 1860 (1987) (citation omitted). If Congress did not have a specific intent, we ask whether the agency's construction of the statute is "rational and consistent with the statute." *NLRB v. United Food & Commercial Workers Union, Local 23*, 108 S. Ct. 413, 421 (1987). Even if the legislative history is insufficient to establish a clear intent under *Chevron*'s first step, it may be relevant in determining the permissibility of the agency's construction. *See, e.g., Securities Industry Ass'n v. Board of Governors*, 847 F.2d 890, 896 (D.C. Cir. 1988).

IV. MERITS

A. Used Oil with the Characteristics of Hazardous Waste

As explained above at 4, the EPA's less stringent used oil regulations apply to used oil contaminated solely through ordinary use, even though it exhibits the characteristics of hazardous waste. Petitioner argues that this violates 42 U.S.C. § 6924(q) (Supp. III 1985), which it interprets as requiring the EPA to treat all fuel that exhibits the characteristics of a hazardous waste under the hazardous waste fuel regulations.

The statute requires the EPA to promulgate such standards for hazardous waste fuel "as may be necessary to protect human health and the environment." 42 U.S.C. § 6924(q). But it grants considerable discretion to the

Agency in formulating these standards: "Such standards *may* include any of the requirements set forth in [§ 6924 (a)] *as may be appropriate.*" *Id.* (emphasis added). (Section 6924(a) lists various requirements (e.g., record-keeping, monitoring, treatment practices) to be imposed by regulation by the EPA on hazardous waste treatment, storage, and disposal facilities.)

The Agency complied with its statutory obligation by promulgating standards for all used oil that exhibits the characteristics of hazardous waste and is burned as fuel: Hazardous used oil is regulated strictly, off-specification used oil is regulated less strictly, and specification used oil is regulated only slightly. This regulatory scheme reflects the EPA's expert judgment concerning the amount of regulation necessary to protect human health and the environment from the adverse effects of various types of used oil. The record amply supports this judgment, and petitioner does not seriously challenge the factual basis for the Agency's classifications.

The language of section 6924(q) permits the Agency to impose only such of the requirements of section 6924 (a) "as may be appropriate." The structure of the statute confirms the EPA's broad discretion to impose less stringent requirements on used oil fuel. The EPA is authorized by 42 U.S.C. § 6935(a) to regulate recycled oil (including oil that is burned). Such regulations are not to "discourage the recovery or recycling of used oil, consistent with the protection of human health and the environment." *Id.; see also id.* at §§ 6935(c) & (d). These provisions contemplate EPA rules for regulated used oil fuel that may be less stringent than rules applicable to other hazardous wastes.

Petitioner further suggests that the regulations irrationally distinguish between used oil displaying hazardous characteristics based on how the oil obtained those characteristics. The Agency provided a reasoned basis for this distinction. When oil acquires the characteristics of

hazardous waste through normal use, overly stringent regulations may discourage burning. This might encourage improper disposal of used oil, thereby increasing environmental harm while decreasing energy conservation. On the other hand, the EPA thought used oil that is deliberately mixed with hazardous waste should be regulated as stringently as other hazardous waste fuel. Less stringent regulation would encourage such mixing to avoid the hazardous waste fuel regulations, resulting in greater environmental danger.

In *HWTC I*, we reversed the EPA's decision not to list recycled oil as a hazardous waste. If the Agency decides that the technical criteria for listing are met, it will then be required to determine what standards to promulgate under 42 U.S.C. §§ 6935(c) & (d), which will require the EPA to review the appropriateness of its rules concerning regulated used oil.

B. Small Quantity Generators

When used oil is mixed with hazardous waste, it is ordinarily treated as hazardous used oil. But when the hazardous waste is produced by a small quantity generator, the rules treat the mixture only as regulated used oil. Petitioner argues that this amounts to an exemption of such mixtures from regulation in violation of section 6924(q). We disagree.

First, as we have just explained, the Agency's rules concerning regulated used oil adequately carry out its responsibilities under section 6924(q). The Agency reasonably concluded that the burdens on small quantity generators resulting from the hazardous fuel regulations outweighed their benefits. Applying the less stringent rules concerning regulated used oil adequately fulfills its statutory mandate.

Second, acting under 42 U.S.C. § 6921(d)(4), the Agency already exempted small quantity generators from

hazardous waste regulations. If small quantity generators mix their hazardous waste with used oil, however, they are subject to the standards applicable to regulated used oil. Admittedly, these regulations are less stringent than the hazardous oil regulations, but they are more stringent than the exemption small quantity generators would enjoy if they did not mix.

Petitioner nevertheless argues that the special treatment of small quantity generators invites circumvention of the hazardous oil regulations. When used oil has been mixed with hazardous waste, there is no way to determine whether the hazardous waste came from a small quantity generator. Large quantity generators might be tempted to mix their wastes with oil and disguise the mixtures as produced by small quantity generators. The Agency thought this result unlikely given the presumption that oil with 1,000 ppm of total halogens is hazardous used oil. The burden will be on the holder of the oil to prove that the hazardous waste part of the mixture was produced by a small quantity generator. The EPA's expert judgment was reasonable.

C. Dilution

As discussed above at 4, regulated used oil fuel is divided into two categories: specification (subject to minimal regulation) and off-specification. The specifications are designed to protect individuals having the greatest exposure to the oil. Most of the specifications are expressed as percentages of total volume (ppm), and the Agency will permit dilution of off-specification oil with virgin oil in order to meet the specifications. Petitioner claims that by permitting dilution, the rules will not decrease *total* emissions of these toxic constituents, in violation of the EPA's duty to protect the environment. 42 U.S.C. § 6935(a).

The EPA's decision was permissible. First, Congress has not spoken directly to the precise question at issue.

See Chevron, 467 U.S. at 842. The statute requires the EPA to regulate used oil fuels "as may be necessary to protect human health and the environment," 42 U.S.C. § 6924(q); *see also id.* at §§ 6935(a) & (c), but it does not specifically require the Agency to minimize total emissions of toxic constituents from used oil into the environment.

Petitioner nevertheless claims that Congress had a specific intent on this issue. It relies on a passage in the House Report on the Hazardous and Solid Waste Amendments of 1984. In discussing the provisions that became sections 6935(c) and (d), which require the promulgation of standards for used oil recycling facilities, the Report explains that such standards might apply to the end user. H. Rep. No. 198, pt. 1, 98th Cong., 1st Sess. 67 (1983). The Report continues:

> This is not to say that these . . . standards must necessarily apply to all end users of hazardous used oil or used oil-derived products. (Indeed, it is the Committee's view that standards are most appropriately applicable to the initial treater of hazardous waste used oil since, if contaminants are not removed at this point, total pollutant loadings from end use will not be reduced, even if the used oil is diluted before end use.)

Id. at 68.

We do not agree that this parenthetical remark establishes congressional intent concerning the precise question at issue.

> Congress does not act, and cannot legally bind, through its intent and expectation as such, whether individually or collectively expressed, but only through the laws that it enacts. Thus, the only intent or expectation of Congress pertinent to our task is its intent regarding the meaning of statutory language or its expectation regarding the manner in

> which that language will be interpreted. . . . [I]t is absurd—indeed, lawless—to give legal effect to [legislative history] that purport[s] to relate, not to the meaning of the statute, but to the manner in which a legally unconstrained agent of the Executive will behave under it.

Center for Auto Safety v. Peck, 751 F.2d 1336, 1351 (D.C. Cir. 1985). Thus, "courts have no authority to *enforce* principles gleaned solely from legislative history that has no statutory reference point." *International Bhd. of Elec. Workers, Local 474 v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987) (emphasis original).

As the parenthetical sentence of the House Report does not interpret a provision of the statute, it is not pertinent in ascertaining legislative intent. This is not a case such as *Pierce v. Underwood*, 108 S. Ct. 2541 (1988), in which the statute contains a phrase ("substantially justified") that could be interpreted in two ways, and the legislative history might demonstrate that Congress meant one way rather than the other. Here, Congress gave the EPA a broad mandate—regulate as "may be necessary to protect human health and the environment." The sentence from the House Report does not even purport to interpret the extent of the Agency's authority. It suggests how the Committee thought the Agency should exercise that authority but provides no assistance in interpreting ambiguous statutory language.

The most that can be said about the parenthetical sentence is that it demonstrates that one of Congress' goals was to reduce total emissions. It does not indicate that Congress desired the EPA to reduce total emissions at all costs. As we discuss below, the Agency concluded that prohibiting dilution would decrease total emissions but would increase improper disposal of used oil, resulting in greater environmental damage overall. Did Congress intend that the Agency reduce total emissions even if this

would result in increases in other types of environmental damage? Congress did not speak to this precise question.

We therefore ask whether the Agency's rule reflects a permissible construction of the statute. The EPA was confronted by conflicting objectives. It recognized that its duty to protect the environment included a responsibility to attempt to reduce total emissions. But it also found that if it prohibited dilution, re-refiners would be unable to deal with the resulting glut of used oil. This would increase unregulated burning and dumping of used oil, magnifying the overall damage to the environment. The record supports this conclusion, and petitioner does not challenge its factual basis.

The Agency's resolution of the trade-off between conflicting goals is the essence of the discretion Congress has delegated it. When, as here, Congress has not spoken to the precise question and the agency provides "a reasonable explanation for its conclusion that the regulation serves the . . . objectives [in question]," *Chevron*, 467 U.S. at 863, we will not overturn the agency's judgment. *Continental Air Lines v. DOT*, 843 F.2d 1444, 1450-54 (D.C. Cir. 1988).

V. Conclusion

That portion of the petition for review concerning the exemption promulgated pursuant to the Bevill Amendment is dismissed for lack of standing. In all other respects, the petition for review is denied.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1143

HAZARDOUS WASTE TREATMENT COUNCIL,
Petitioner

-v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents

Before: BUCKLEY and WILLIAMS, *Circuit Judges* and EDWARD D. RE, *Chief Judge*, U.S. Court of International Trade

ORDER

[Filed Dec. 20, 1988]

Upon consideration of the petitions for rehearing of petition and respondent it is

ORDERED, by the Court, that the aforesaid petitions are denied.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1143

HAZARDOUS WASTE TREATMENT COUNCIL,
Petitioner

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, *Circuit Judges*; and EDWARD D. RE, *Chief Judge*, United States Court of International Trade

ORDER

[Filed Dec. 20, 1988]

The Suggestion for Rehearing *En Banc* of Petitioner Hazardous Waste Treatment Council has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 31, 1988 Decided January 13, 1989

Nos. 87-1487, 87-1548

PETRO-CHEM PROCESSING, INC.,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Argued November 1, 1988 Decided January 13, 1989

No. 88-1177

HAZARDOUS WASTE TREATMENT COUNCIL,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Petitions for Review of an Order of the
Environmental Protection Agency

Ridgway M. Hall, Jr. and *Richard G. Stoll*, with whom *Barbara A. Myers* and *R. Timothy McCrum* were on the joint brief for the petitioners in Nos. 87-1487 and 87-1548. *David B. Graham* also entered an appearance for petitioner in No. 87-1487.

David R. Case for petitioner in No. 88-1177.

Scott A. Schachter, Attorney, Department of Justice, with whom *Roger J. Marzulla*, Assistant Attorney General, Department of Justice, and *Caroline H. Wehling*, Attorney, Environmental Protection Agency, were on the brief, for respondent in Nos. 87-1487 and 87-1548.

Lisa F. Ryan, Attorney, Department of Justice, with whom *Roger J. Marzulla*, Assistant Attorney General, Department of Justice, *Lawrence Jensen*, General Counsel, *Frederic D. Chanania* and *Nandan Kenkeremath*, Attorneys, Environmental Protection Agency, were on the brief, for respondent in No. 88-1177.

Charles F. Lettow, *Matthew D. Slater* and *R. Kinnon Goleman* were on the brief for amicus curiae, urging dismissal of petition in No. 88-1177.

Before: RUTH B. GINSBURG, SILBERMAN and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RUTH B. GINSBURG.

GINSBURG, RUTH B., *Circuit Judge*: Petitioners Hazardous Waste Treatment Council (HWTC) and Petro-Chem Processing, Inc., in Nos. 87-1487 and 87-1548, challenge an Environmental Protection Agency (EPA or Agency) time-extension decision; the challenged decision enlarged by more than three years the deadline for "big city" cement kilns to apply for "interim status," which would allow them to burn liquid hazardous waste without a permit. Petitioners aslo challenge a decision of the Agency that would allow St. Mary's Peerless Cement Company, a big city cement kiln in Detroit, to qualify for interim status despite St. Mary's alleged failure to meet the deadline for filing the requisite "Notification of Hazardous Waste Activity." Petitioners assert that these Agency actions violate the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6991i (1982 & Supp.

IV 1986), which establishes a comprehensive scheme to regulate hazardous wastes, the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1982), and the EPA's own regulations. Petitioner HWTC, in No. 88-1177,[1] challenges EPA regulations authorizing for the first time the disposal of hazardous waste in salt domes, salt bed formations, underground mines, and caves. HWTC asserts that these regulations are incompatible with RCRA. Bound by this court's recent decision in *Hazardous Waste Treatment Council v. EPA*, No. 86-1143 (D.C. Cir. Oct. 7, 1988), *reh'g en banc denied* (Dec. 20, 1988) (*HWTC II*), we dismiss these petitions on the ground that the challengers lack standing to pursue judicial review.

I. Competitor Claims

In their initial briefs, filed before the opinion in *HWTC II* issued, petitioners' standing arguments tracked those advanced and rejected in *HWTC II*. HWTC is a national trade organization of firms engaged in the treatment of hazardous waste and the manufacture of equipment for the purpose; the organization alleged that it had standing as a representative of its member companies under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) (recognizing organizational standing based on injuries to members if the interests of those members are germane to the organization's purpose and if the participation of individual members is not required). Petro-Chem alleged injury on its own behalf.

In Nos. 87-1487 and 87-1548, HWTC aleged that its members would sustain competitive and economic injury because of EPA's extension of the interim status dead-

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[1] Petro-Chem Processing, Inc. v. EPA, Nos. 87-1487, 87-1548, and Hazardous Waste Treatment Council v. EPA, No. 88-1177, were briefed and argued separately. We consolidated the three review petitions for disposition in this opinion.

line, 52 Fed. Reg. 34,779 (1987) (notice of extension of compliance date), and the Agency's grant of interim status to St. Mary's. Specifically, HWTC asserted that St. Mary's and other new entrants would avoid many of the costs and the waiting period involved in obtaining a permit and would reduce the supply of hazardous waste available to HWTC's members, thus depriving them of revenue. Joint Brief of Petitioners at 8-9, 43-46 (Nos. 87-1487, 87-1548). Petro-Chem is a Deroit company that blends hazardous waste fuels for burning in industrial furnaces such as cement kilns; Petro-Chem alleged that St. Mary's entry into the market would reduce Petro-Chem's supply of hazardous waste and its blending revenue because St. Mary's fuel would be processed by a competing blending operation. *Id.* at 10, 62-63.

In No. 88-1177, HWTC alleged that its members would suffer injury from (1) EPA's determination, 52 Fed. Reg. 46,946, 46,953 (1987) (preamble to final rule), to allow the disposal of hazardous wastes into salt domes, underground caves, and mines, through an "injection well," with only a RCRA "permit-by-rule" under 40 C.F.R. § 270.60(b), and (2) EPA's definition of "miscellaneous unit," 52 Fed. Reg. 46,963 (1987) (to be codified at 40 C.F.R. § 260.10), to include salt domes, mines, and caves, thereby allowing the disposal of hazardous waste into such geologic repositories, by means other than an injection well, subject only to the general performance standard of subpart X, 52 Fed. Reg. 46,964-65 (1987) (to be codified at 40 C.F.R. § 264.601), and not to any specific technical standards. These EPA actions, allegedly in violation of RCRA section 3004(b)(2), 42 U.S.C. § 6924(b)(2) (Supp. IV 1986), would, according to HWTC, lead to the diversion of hazardous wastes into geologic repositories and thus allow competitors using these cheaper disposal methods to gain business at the expense of HWTC members. Reply Brief of Petitioner at 4 (No. 88-1177).

HWTC II held, however, that the prudential requirement for standing under RCRA was not met by HWTC's allegations that lax regulation of competitors would cause economic harm to HWTC members. In that case, HWTC sought review of EPA's prescription, 50 Fed. Reg. 49,164 (1985), excluding from the hazardous waste fuel regulations some used oil that has acquired the characteristics of hazardous waste. HWTC charged that the exclusion violated RCRA. The *HWTC II* panel held that HWTC's members' interest in stricter regulation of their competitors fell outside the zone of interests Congress intended to protect in enacting RCRA. Firms concerned about regulatory laxity, such as those represented by HWTC, the court said, lacked standing "[i]n the absence of any suggestion either of congressional intent to improve the competitive position of high tech recyclers, or of any reason to picture such firms as suitable challengers of the agency." *HWTC II*, slip op. at 12-13. Neither condition, the court concluded, was met by HWTC members. The court discerned no congressional intent to improve the competitive position of high tech recyclers. Nor did it see any reason to regard such firms as "suitable challengers" of the Agency's action.[2]

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[2] In the instant cases, HWTC also alleges institutional harm from EPA's actions over and above the impacts on its members. Specifically, HWTC alleges that EPA's actions will frustrate the environmental purpose and programs of HWTC, damage the public's trust in the hazardous waste treatment industry, and deprive HWTC of dues by decreasing members' income. Joint Brief of Petitioners at 9-10, 52-54 (Nos. 87-1487 and 87-1548); Reply Brief of Petitioners at 7-8 (No. 88-1177).

This court rejected similar arguments concerning frustration of the organization's purposes and damage to the public's trust in *HWTC II*, however, because HWTC failed to link the alleged injuries to RCRA's purpose. If a general coincidence of RCRA's purposes and HWTC's goals were sufficient to satisfy the prudential standing requirement, this court reasoned, "persons with only a 'generalized grievance[],' concededly insufficient for standing, could simply form an organization to advance their grievance, and, when-

On October 13, 1988, six days after *HWTC II* issued, we requested supplemental briefing on prudential standing in these cases. In their supplemental briefs, petitioners argued that *HWTC II* was wrongly decided and indicated HWTC's intention to request rehearing en banc. Petitioner HWTC Supplemental Brief at 1-7 & n.1 (No. 88-1177); Supplemental Brief of Petitioners at 1-6 & n.1 (Nos. 87-1487, 87-1548). This court denied rehearing en banc in *HWTC II* on December 20, 1988. *HWTC II* thus remains the law of the circuit; therefore petitioners' arguments attacking that decision are unavailing.

At oral argument, HWTC attempted to distinguish the legislative design of the provisions at issue in these cases from the congressional intent found in *HWTC II*. To this purpose, HWTC attached to Petitioner HWTC's Response to EPA's Motion to Strike Affidavit of Adolph B. Chilek (No. 88-1177) an "Addendum of Legislative History on Congressional Intent to Benefit the Hazardous Waste Treatment Industry." The legislative history thus cited by HWTC,[3] however, merely confirms "Congress's indisputable intent to encourage proper disposal and recycling of hazardous wastes." *HWTC II*, slip op. at 11. That *leitmotif*, *HWTC II* settled, does not amount

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ever an agency decision offended their position, secure standing by asserting that it had thrown practical roadblocks in the way of the organization's successes." *HWTC II*, slip op. at 19 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974). HWTC's new argument about the impact of a reduction in dues is founded on the alleged competitive harm to members, and hence cannot withstand *HWTC II* either.

[3] *See, e.g.*, H.R. CONF. REP. No. 1133, 98th Cong., 2d Sess. 80 (1984) ("advanced treatment, recycling, incineration and other waste control technologies should replace land disposal"); S. REP. No. 284, 98th Cong., 1st Sess. 6 (1983) (capacity for "alternative technologies" can "be developed if a viable market can be assured"); H.R. REP. No. 1918, 98th Cong., 1st Sess. 32 (1983) ("prudent public policy" would "encourage the development of alternative treatment technology and capacity").

to evidence either of "congressional intent to improve the competitive position of high tech recyclers, or of any reason to picture such firms as suitable challengers" of Agency departures from Congress's ultimate goals. *Id.* at 12-13. Petitioners cannot so easily avoid the reach of *HWTC II*, nor can this panel; ruling in fidelity to that decision, we hold that petitioners' claims here fail to meet the prudential standing requirement.

II. Direct Environmental Claims

The *HWTC II* court did find standing for the organization as representative of one member firm; that firm, HWTC alleged, was injured as a "consumer" of the oil subject to the challenged regulations. HWTC asserted that the firm's facilities for receiving used oil are injured by adulterated or contaminated used oils, and that it is expensive to test every tankload. *HWTC II*, slip op. at 7. More stringent EPA regulations would tend to protect against this sort of injury.

HWTC's charter states that it aims, among other things, to "promote the protection of the environment through the adoption of environmentally sound practices and methods of destroying and treating hazardous wastes." *Id.* at 16. The court in *HWTC II* had "no doubt of [HWTC's] bona fides" and held that the member firm's consumer interest was germane to the environmental organizational purpose. *Id.* The germaneness test requires "mere pertinence between litigation subject and organizational purpose." *Id.* Relying on the reasoning in *Humane Society of the United States v. Hodel*, 840 F.2d 45, 58-60 (D.C. Cir. 1988), the *HWTC II* panel concluded that HWTC had standing to represent the consumer environmental interest there raised. *HWTC II*, slip op. at 18.

According to affidavits attached to the supplemental briefs of petitioners, HWTC added two individuals as

members on October 12, 1988. HWTC alleges direct environmental harm to these two individuals, Adolph Chilek and Larry Coogan, from the EPA actions challenged in No. 88-1177, and in Nos. 87-1487 and 87-1548, respectively. Chilek owns a homestead located directly on top of the Boling Salt Dome in Texas. Petitioner HWTC Supplemental Brief at 7 (No. 88-1177). Coogan lives and works near St. Mary's kiln in Michigan. Supplemental Brief of Petitioners at 6-7 (Nos. 87-1487, 87-1548). By asserting the interests of these new members, HWTC seeks to bring the organization within *HWTC II*'s consumer environmental injury holding.

The EPA has moved to strike the affidavits that allege the membership of Chilek and Coogan in HWTC and their threatened injuries. We agree with the EPA that it would circumvent the time limit on filing petitions for review under RCRA, 42 U.S.C. § 6976(a)(1) (1982), to permit these new members, at this late date, to establish standing for HWTC. Under the cited time prescription, a party must file a petition for review of a regulation within ninety days of promulgation of that regulation.

Neither Chilek nor Coogan was a member when HWTC filed its petitions for review or at any other time during the two relevant RCRA ninety-day time frames. The regulations at issue in No. 88-1177 were published in the Federal Register on December 10, 1987, and HWTC filed a timely petition on March 2, 1988. The notice of extension at issue in Nos. 87-1487 and 87-1548 was published in the Federal Register on September 15, 1987, and HWTC filed a timely petition on October 6, 1987. Both Chilek and Coogan would be time-barred if they asserted their claims as individuals on October 12, 1988.

Under *Hunt v. Washington State Advertising Commission*, 432 U.S. 333 (1977), an organization's standing turns on its members' standing to sue in their own right. *Id.* at 343. Although the interests Chilek and Coogan

assert may rank with the consumer interest held sufficient for standing in *HWTC II*, these individuals did not file timely petitions for review. Petitioners assert that the time prescription, section 6976(a)(1), sets merely a "notice deadline." Petitioners' Memorandum in Opposition to Respondent's Motion to Strike Affidavit at 8 (Nos. 87-1487, 87-1548). Circuit precedent instructs, however, that the time direction in question reflects " 'the important purpose of imparting finality into the administrative process, thereby conserving administrative resources.' " *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985) (quoting *Natural Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981)).

To allow a "new and improved" HWTC to establish a judicially cognizable challenge several months beyond RCRA's prescription period would undercut " 'a deliberate congressional choice to impose statutory finality on agency orders.' " *Id.* (quoting *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979)). Were we to agree with HWTC, an organization without current standing to sue could file a timely petition for review and thereby extend the statutory period while it seeks out and signs up a person who could have sued but did not do so within the prescribed time. Such an approach to timeliness would render the finality of agency action an uncertain, sometimes thing.

Oil, Chemical and Atomic Workers International Union v. OSHRC, 671 F.2d 643 (D.C. Cir.), *cert. denied*, 459 U.S. 905 (1982), is not precedent for the position petitioners here urge. In that case we allowed a petitioner to name the proper party respondent outside the sixty-day review period provided by the Occupational Safety and Health Act. *Id.* at 653. The petitioner had inadvertently named the incorrect respondent, and the amendment we permitted simply corrected the petition to read as its should have and could have read within the statutory period. In these cases, in contract, HWTC seeks to

allege facts (the memberships of Chilek and Coogan) necessary for standing that it could not have alleged truthfully within the statutory period. Although a court "has the power to allow or require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing," *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975), [4]*accord Sierra Club v. Morton*, 405 U.S. 727, 736 n.8 (1972), a petitioner asserting organizational standing cannot succeed if the new affiliation it pleads came about only after the statutory time limit.[4]

III. Environmental Consumer Claims

Lax EPA regulation of hazardous waste disposal in salt domes, HWTC maintains, creates a dilemma for some of its members, and both horns entail economic injury: "[M]embers that provide cleanup services or waste brokering for customers will either lose business if they do not use geologic repositories, or face greater potential liability for disposal in unprotective geologic repositories." Reply Brief of Petitioner at 4 (No. 88-1177). At oral argument HWTC vigorously asserted that members would be "forced" to utilize salt domes and become "consumers" of EPA-permitted "lax" disposal methods. In the event these allegedly unsafe repositories leak, HWTC continued, members using them would face strict, joint, and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9657 (1982).

This potential liability, however, insofar as it is incurred voluntarily, is not an injury that "fairly can be

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[4] Section 697(a)(1) creates an exception only "if such petition for review is based solely on grounds arising after such ninetieth day." 42 U.S.C. § 6976(a)(1) (1982). This exception does not apply in these cases, in which the substantive grounds for the petitions arose, if at all, before the time limit expired.

traced to the challenged action,'" as required by Supreme Court decisions intercepting Article III of the Constitution. *Valley Force Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976)). Rather, to the extent that this injury is self-inflicted, it is "so completely due to the [complainant's] own fault as to break the causal chain."[5] Unlike the "consumer" firm in *HWTC II*, members choosing geologic repositories can avoid the threatened injury by choosing safer methods. If they instead choose disposal methods they believe to be unsafe, they presumably so do in their own self-interest. It is of no moment for the inquiry at hand that they may be "forced" by competitive pressures to choose unsafe methods; we cannot deem them injured, in the sense relevant under controlling precedent, by their own choice to compete in kind.

CONCLUSION

For the reasons stated, the petitions for review in these cases are dismissed. The petitioners, under circuit precedent, lack standing to obtain judicial review. The affidavits alleging membership to Chilek and Coogan cannot establish HWTC's standing to challenge regulations under RCRA because the two individuals joined HWTC outside the statutory period. Accordingly, the motions to strike the two affidavits are dismissed as moot.

It is so ordered.

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[5] 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3531.5, at 458 (2d ed. 1984); *see, e.g.*, Diamond v. Charles, 476 U.S. 54, 69-70 (1986) (party's liability for attorney's fees was a consequence of his own decision to intervene in the case, "cannot fairly be traced" to the law challenged, and cannot confer Article III standing); Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976) (injuries to plaintiff states' fiscs were "self-inflicted," and no state "can be heard to complain about damages inflicted by its own hand").

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1532

In the Supreme Court of the United States

OCTOBER TERM, 1988

HAZARDOUS WASTE TREATMENT COUNCIL, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals properly concluded that petitioner's interests are so marginally related to or inconsistent with the purposes of the Resource Conservation and Recovery Act of 1976 that petitioner lacks standing to pursue the challenges in this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1532

HAZARDOUS WASTE TREATMENT COUNCIL, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-27a, 30a-40a) are reported at 861 F.2d 277 and 866 F.2d 433.

JURISDICTION

The judgment of the court of appeals in No. 86-1143 below was entered on October 7, 1988. Petitions for rehearing were denied on December 20, 1988. Pet. App. 28a. The judgment of the court of appeals in Nos. 87-1487, 87-1548, and 88-1177 below was entered on January 13, 1989. The petition for a writ of certiorari was filed on March 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves challenges by petitioner, an industry trade association, to three regulatory actions taken by the

Administrator of the United States Environmental Protection Agency (EPA), pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*

The first EPA action, which was the subject of the first opinion below, was the promulgation of final regulations establishing standards under Section 3004(q) of RCRA, 42 U.S.C. 6924(q), for used oil that is burned for energy recovery. The court of appeals dismissed part of petitioner's challenge to those regulations for lack of standing and upheld the rule in all other respects. Pet. App. 1a-27a.

The other two EPA actions are the subject of the second opinion below. EPA published a notice establishing the deadline for certain cement kilns burning hazardous waste fuel (HWF) to submit permit applications under Section 3005 of RCRA, 42 U.S.C. 6925 (1982 & Supp. IV 1986). EPA also promulgated final regulations establishing standards for the permitting of "miscellaneous units" under RCRA. The court of appeals dismissed petitioner's challenges to both of those EPA actions because petitioner lacked standing. Pet. App. 30a-40a. In both of its opinions, the court of appeals determined that petitioner's interests in the lawsuits were not within the "zone of interests" protected or regulated under RCRA.

1. In 1976, Congress enacted Subtitle C of RCRA, 42 U.S.C. 6921-6939b (1982 & Supp. IV 1986). Congress's aim was to create a comprehensive "cradle to grave" regulatory program to protect human health and the environment from the risks associated with the improper handling, storage, and disposal of hazardous waste. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976). To that end, EPA must identify and list those solid wastes that are hazardous, and thus subject to regulation under Subtitle C. See

42 U.S.C. 6921.[1] In addition, EPA must establish standards for the treatment, storage, and disposal of hazardous waste, 42 U.S.C. 6924 (1982 & Supp. IV 1986), and no facility that treats, stores, or disposes of hazardous waste may operate without a permit incorporating such standards. 42 U.S.C. 6925 (1982 & Supp. IV 1986). Finally, under Section 3014 of RCRA, 42 U.S.C. 6935 (Supp. IV 1986), EPA is authorized to regulate recycled oil, including used oil that is burned as fuel, even if the oil is not a hazardous waste.

On November 29, 1985, EPA published final regulations establishing treatment and management standards for boilers and industrial furnaces that burn hazardous waste and used oil for energy recovery. See 50 Fed. Reg. 49,164 (1985). That rule establishes two categories of regulation under which only hazardous waste fuel is subject to the stringent requirements for hazardous waste management under RCRA. Used oil burned for energy recovery is generally subject to less stringent regulation. Used oil that is deliberately mixed with hazardous waste, however, is subject to hazardous waste regulation, unless that hazardous waste comes from certain conditionally exempt small-quantity generators. Mixtures of used oil and hazardous waste from these small-quantity generators are subject only to regulation for nonhazardous used oil. *Id.* at 49,202 (renumbered and codified at 40 C.F.R. 261.5(j)). EPA also determined that residues from the combustion of certain fossil fuels and either hazardous waste fuels or

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[1] Section 3001, 42 U.S.C. 6921 (1982 & Supp. IV 1986), contemplates that particular solid wastes will be identified as "hazardous wastes" by virtue of their meeting one or more of the characteristics of hazardous wastes (characteristic wastes) or by virtue of their being specifically listed by EPA in rulemaking proceedings (listed wastes). See 40 C.F.R. Pt. 261.

used-oil fuels in certain industrial furnaces would be entirely exempt from hazardous waste management requirements. 50 Fed. Reg. 49,190 nn.87-89 (1985).

On September 15, 1987, EPA published a notice establishing the permit application deadline for certain cement kilns burning HWF.[2] See 52 Fed. Reg. 34,779 (1987). The notice allowed qualifying cement kilns to continue operation under RCRA "interim status," a statutory authorization that allows certain existing facilities to treat, store, or dispose of hazardous waste while their permit applications are pending. The notice applied only to the few qualifying cement kilns operating in cities with population of more than 500,000. See 42 U.S.C. 6924(q)(2)(C) (Supp. IV 1986).

On December 10, 1987, EPA published final regulations promulgating technical standards for "miscellaneous units." See 52 Fed. Reg. 46,946 (1987). Miscellaneous units are units that are used to treat, store, or dispose of hazardous waste, but that do not meet the description of any specific type of unit (*e.g.*, storage tanks and landfills) for which EPA had already promulgated technical standards. These regulations allowed the permitting of such units as salt domes, salt bed formations, underground mines, and caves for hazardous waste disposal.

2. Petitioner is a trade association that represents hazardous waste treatment facilities and firms that market hazardous waste treatment technology and services. On February 27, 1986, petitioner petitioned the court of appeals for review of the used-oil regulations (C.A. No. 86-1143). None of petitioner's members was subject to regulation under the provisions of the regulations that

[2] Cement kilns produce "cement clinker," which is combined with other materials to make powdered cement. Certain cement kilns are fueled by hazardous waste fuel, a secondary fuel source, as opposed to primary fuel sources such as coal.

petitioner challenged. The legal basis for the challenge was that the regulations were not sufficiently stringent or comprehensive to protect human health and the environment, and thus were inconsistent with EPA's mandate under RCRA. Petitioner claimed standing to maintain the action based on injury to the commercial or economic interests of its members; it alleged that more restrictive regulations would have expanded the market for products and services provided by petitioner's members.

The court of appeals concluded that the commercial interests represented by petitioner are not within the "zone of interests" protected by RCRA. Pet. App. 5a. Thus, petitioner lacks standing to represent member firms allegedly suffering economic injury resulting from the failure of EPA's regulations to force others to use the more costly methods or technology that petitioner's members employ or offer for sale. The court of appeals held, however, that petitioner does have standing to represent members allegedly suffering an environmental injury as a result of the alleged laxity of EPA regulations. Since one of petitioner's members did allege an environmental injury, the court of appeals reached the merits of petitioner's petition for review. The court upheld the used-oil regulations challenged by petitioner as consistent with RCRA. *Id.* at 21a-27a.[3]

3. Petitioner also petitioned for review of the notice establishing the permit deadline for cement kilns (C.A. No. 87-1548) and the regulations for miscellaneous units

[3] The court of appeals' holding that petitioner lacks standing applies only to petitioner's challenge to EPA's exemption from the used-oil regulations for residues from certain industrial furnaces. Petitioner does not seek a writ of certiorari on any of the court of appeals' rulings on the merits.

(C.A. No. 88-1177).[4] At the time the petitions for review were filed, petitioner alleged solely economic and competitive injury to its members as a result of EPA's actions. The economic injury was a loss of potential treatment business and HWF supply as a result of the diversion of hazardous waste to less costly methods of hazardous waste management. Such diversion was allegedly encouraged by the EPA actions, which allowed certain cement kilns to burn HWF before receiving a permit, and the potential permitting of geologic repositories for disposal of hazardous wastes.

The court of appeals held the petitions for review pending the disposition of a petition for rehearing with suggestion of rehearing en banc concerning the holding in its earlier opinion that petitioner's allegations of economic injury do not suffice for standing purposes. See Pet. App. 35a. On December 20, 1988, the court of appeals unanimously denied rehearing and rehearing en banc. *Id.* at 28a-29a. The court of appeals then disposed of the pending consolidated petitions for review based on its earlier opinion. The court of appeals held that the alleged competitive economic injuries are insufficent to bring petitioner within the zone of interests protected by RCRA. *Id.* at 32a.

The court of appeals also rejected petitioner's claim of standing on the basis of the interests of two new "members" of petitioner—individual private citizens allegedly suffering environmental injury—because those individuals were added as members after the statutory 90-day period (see 42 U.S.C. 6976(a)(1)) for challenging

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[4] The court of appeals consolidated those two petitions, and a similar petition filed by Petro-Chem Processing, Inc. (C.A. No. 87-1487), which is not a party here (Pet. ii n.**), for disposition in a single opinion.

these actions under RCRA. Pet. App. 36a-39a. Finally, the court of appeals also held that the possibility that some of petitioner's members might dispose of their treatment residues in geologic repositories that fail to contain the residues in the future, that those members might ultimately be financially responsible for the resulting contamination, does not provide standing. *Id.* at 39a-40a. Because petitioner's members are not required to use any unsafe disposal methods, and the use of the geologic repositories would be entirely voluntary, the court found the alleged economic injury to be self-inflicted, and thus not fairly traceable to the challenged EPA regulations.

ARGUMENT

The standing "zone of interests" test concerns "the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute * * * in question." *Association of Data Processing Service Orgs., Inc.* v. *Camp,* 397 U.S. 150, 153 (1970). The test excludes plaintiffs whose lawsuits "are more likely to frustrate than to further the statutory objectives." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 397 n.12 (1987).

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Id. at 399. The court of appeals properly applied this prudential "zone of interests" test to petitioner's interests in the cases below. Petitioner's fact-bound challenges to the straight forward analysis of the court of appeals do not merit this Court's review.

1. Petitioner first argues (Pet. 10-22) that the ruling below is contrary to this Court's decision in *Clarke* v. *Securities Indus. Ass'n, supra.* Petitioner contends that the court of appeals required an affirmative demonstration of congressional intent to benefit the petitioner in order to demonstrate standing, a proposition rejected by this Court in *Clarke.* That is incorrect. Instead, the court of appeals sought to find "operational meaning for a test that demands less than a showing of congressional intent to benefit but more than a 'marginal[] rela[tionship]' tc the statutory purposes." Pet. App. 10a.

Under this Court's decision in *Clarke*, whether a plaintiff is within the "zone of interests" of a statute is a question of whether it should be reasonably inferred that Congress intended that a person with the interest of the particular plaintiff be relied on to challenge an agency's alleged disregard for the law. *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403.[5] Under the principles set forth in *Clarke*, the prudential test for standing does not require an indication of a congressional purpose to benefit the plaintiff. *Id.* at 399-400. Rather, the zone of interests test is satisfied when " 'Congress ha[s] *arguably legislated against the [injury]* that [petitioner seeks] to challenge.' " *Id.* at 403 (quoting *Investment Co. Inst.* v. *Camp.*, 401 U.S. 617, 620 (1971) (emphasis added)). See *Arnold*

[5] Petitioner confuses two related, but separate issues: reviewability, or whether a particular agency action is subject to judicial review by *any party* (see *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984)), and the standing zone of interests test, or whether a *particular party* should be heard to challenge a particular agency action. Pet. 10-11, 23-24. See *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 399. The general presumption in favor of judicial review of agency action under the Administrative Procedure Act does not concern the issue of who are proper parties to challenge agency action.

Tours, Inc. v. *Camp*, 400 U.S. 45, 46 (1970); *Data Processing Service Orgs.*, 397 U.S. at 155-156.

Petitioner's members are not regulated by the provisions of the regulations that they challenged in the petitions for review. Nor does petitioner represent, or otherwise claim here an injury to its members with respect to, the human health or environmental interests that RCRA was indisputably designed to protect.[6] Rather, petitioner's sole interest in these challenges is the enhanced market position and profit to its members that may result from the application of more stringent or comprehensive environmental regulations to other members of the regulated community. Because the pecuniary interests of its members thus may coincide with more stringent hazardous waste regulation, petitioner asserted below that its interests are within the zone of interests protected under RCRA.

In assessing the standing of petitioner, the court of appeals determined that the treatment industry was not an intended beneficiary of the congressional purpose to protect human health and the environment under RCRA. Pet. App. 11a, 35a-36a. Rather, the financial benefit to petitioner's members resulting from the statute and EPA regulations was an incidental result of the congressional objective in RCRA to promote safer management of hazardous waste by encouraging treatment and recycling over land disposal. As the court of appeals observed, the indisputable congressional intent to promote human health and the environment by encouraging the proper treatment and disposal of hazardous wastes

> shows neither that Congress intended to benefit recycling and disposal firms nor that such firms' in-

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[6] See 42 U.S.C. 6902(a)(4) and (6) (Supp. IV 1986). See also H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976); H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 80-81 (1984).

> terests are more than "marginally related" to Congress's environmental purposes. Whenever Congress pursues some goal, it is inevitable that firms capable of advancing that goal may benefit. If Congress authorized bank regulators to mandate physical security measures for banks, for example, a shoal of security services firms might enjoy a profit potential. * * * [A] rule that gave any such plaintiff standing merely because it happened to be disadvantaged by a particular agency decision would destroy the requirement of prudential standing; any party with constitutional standing could sue.

Pet. App. 11a.

In applying the *Clarke* analysis to petitioner, the court of appeals found that petitioner's interests were no more than marginally related to the purposes of RCRA. Pet. App. 10a-11a. That is because petitioner was before the court of appeals not as a protector of the environment, but as a representative of a group of entrepreneurs promoting business expansion and seeking protection from alleged economic injury caused by increased competition. *Id.* at 9a. Thus, the court of appeals properly determined that petitioner's competitive interests were only incidentally related to RCRA's environmental goals.[7]

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[7] Contrary to petitioner's argument that the court of appeals created a new test or barrier for standing by requiring an affirmative demonstration of congressional intent to permit suit, the court of appeals expressly stated that the prudential zone of interest test "demands less than a showing of congressional intent to benefit but more than a 'marginal[] rela[tionship]' to the statutory purposes." Pet. App. 10a. The court of appeals' formulation of the test takes into account circumstances—which the court of appeals found to be present in the cases below—where a petitioner's interests "are more likely to frustrate than to further statutory objectives." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 397 n.12. Accordingly, the court of appeals ac-

Contrary to petitioner's assertion, the court did not require the explicit indication of congressional intent to benefit that this Court rejected in *Clarke*. Rather, the court sought to determine whether petitioner, which is only an incidental beneficiary of congressional action and asserts interests that may be inconsistent with statutory goals, asserts any interest that is more than marginally related to the statutory purposes. In so doing, the court of appeals looked for factors other than explicit indications of congressional intent that would support a reasonable inference that Congress arguably intended to permit the suit. That inquiry, which is entirely consistent with *Clarke* and, indeed, which must be undertaken if the "zone of interests" test is to mean anything, is (in context) all that the court of appeals meant by saying that a court should determine whether a would-be litigant such as petitioner is "a peculiarly suitable challenger of administrative neglect," Pet. App. 11a.

Nor did the court ignore the statutory context, as petitioner asserts (Pet. 13-17). Rather, the court of appeals determined that the statutory goals of RCRA, Pet. App. 11a, and the relevant legislative history, *id.* at 35a-36a, confirm congressional intent to encourage proper disposal and recycling of hazardous waste. The court of appeals concluded, however, that such an intent does not demonstrate that the competitive and financial interests of hazardous waste treatment *firms* have more than a marginal relationship to Congress's environmental goals under RCRA. *Ibid.*

Moreover, the court of appeals perceived a significant risk that petitioner's challenges under RCRA could pro-

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counted for both elements of the zone of interest test articulated in *Clarke*: the "marginally related" element *and* the "inconsistent with the purposes implicit in the statute" element. *Id.* at 399.

duce results inconsistent with the environmental goals of the statute. Pet. App. 11a-12a. The court of appeals determined that the outcome of judicial review initiated to promote petitioner's competitive interests, while it might benefit the profits of petitioner's members, could lead to environmentally harmful results. *Id.* at 12a. That is because the increased cost of more stringent regulations might lead to the substitution of more environmentally harmful waste management methods. *Ibid.*

The same risk was also present in Nos. 87-1487 and 87-1548 below, wherein petitioner sought to limit the number of facilities burning HWF in competition with petitioner's members. If successful, petitioner's challenge would have fostered the use of rural cement kilns, which are totally unregulated under RCRA, and the associated transportation of hazardous waste over long distances to those kilns. Another result of petitioner's challenge might be that fewer facilities would be qualified to treat hazardous waste, contrary to congressional intent to promote environmentally protective process substitution, materials recovery, properly conducted recycling and reuse, and treatment. See 42 U.S.C. 6902(a)(4) and (6) (Supp. IV 1986). The court of appeals' ruling was thus a direct application of *Clarke* to the standing of petitioner under RCRA.

Petitioner concedes here (Pet. 17) that the protection of its economic and competitive interests was "obviously not the ultimate purpose" that Congress intended to further in enacting RCRA.[8] Rather, Congress was legislating to protect human health and the environment. Congress was not

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[8] To support its argument that EPA has "openly acknowledged" consistency between petitioner's interests and the goals of RCRA, petitioner cites a *Federal Register* notice in an unrelated administrative proceeding in which EPA restated allegations of fact that petitioner has made. Pet. 17 n.20; see 52 Fed. Reg. 43,906 (1987). The statement in the *Federal Register* notice, however, was merely a recitation of an

regulating economic competition in RCRA.[9] Consequently, Congress has not " 'arguably legislated against the [injury] that [petitioner seeks] to challenge.' " *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403 (quoting *Investment Co. Inst.* v. *Camp*, 401 U.S. at 620). The court of appeals reasonably concluded that a number of factors preclude any reasonable inference that Congress intended to rely on commercial interests such as petitioner's to vindicate environmental claims under RCRA.

2. Petitioner contends (Pet. 13, 28) that the decision below conflicts with *DeLoss* v. *Department of Housing & Urban Development*, 822 F.2d 1460 (8th Cir. 1987); *Foremost Sales Promotions, Inc.* v. *Director, Bureau of Alcohol, Tobacco & Firearms*, 860 F.2d 229 (7th Cir. 1988); and *City of Milwaukee* v. *Block*, 823 F.2d 1158 (7th Cir. 1987). No such conflict exists.

The present case turns on whether Congress has " 'arguably legislated against the [injury] that [petitioner seeks] to challenge,' " *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403, an inquiry that naturally will vary in its application from statute to statute. The court of appeals, faithfully carrying out the inquiry mandated by *Clarke*, studied the provisions and purposes of RCRA and deter-

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as-yet-unsubstantiated allegation by petitioner in administrative proceedings that have not yet been completed. See 53 Fed. Reg. 32,899 (1988).

[9] In the cases where this Court has found competitor standing, the statutes at issue contained provisions protecting parties from unlawful competition. See, *e.g.*, *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 5-7 (1968); *Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77, 83-84 (1958). RCRA contains no such provisions that make competition unlawful. Thus, the court of appeals properly concluded that the cases involving commercial competition and market entry restrictions do not apply to the zone of interests inquiry under RCRA. Pet. App. 12a-14a.

mined that it would be inconsistent with the purpose of the relevant statute to allow the suit. See also *Sacilor, Acieries et Laminoirs de Lorraine* v. *United States*, 815 F.2d 1488, 1491 (Fed. Cir.), cert. denied, 108 S. Ct. 285 (1987). The cases that petitioner cites involve the construction of statutes whose provisions and purposes do not remotely resemble those of RCRA—in *DeLoss*, statutes providing support for low-income housing; in *Foremost*, a statute regulating the economic relationship between distributors and retailers of alcoholic beverages; and in *Milwaukee*, statutes regulating the preferences among various shippers of agricultural commodities. To hold that "competitors" of those who are primarily regulated by *those* statutes have standing is hardly to say that any decision denying "competitors" standing under *any* statute is wrong. The decision below in no sense conflicts with the decisions that petitioner cites.

3. Petitioner also asserts (Pet. 22-30) that the court's ruling represents a significant restriction on judicial review of agency action allegedly inconsistent with statutory directives, particularly EPA actions under environmental statutes. The ruling below is very narrow, however. The question addressed by the court was not whether commercial injury is a basis for standing in challenges to environmental regulations, whether the treatment industry has standing to participate in administrative actions, or whether petitioner may be a party to a challenge alleging unlawful laxity in EPA regulations. Rather, the court below merely held that petitioner's commercial or competitive economic interests fail to meet prudential standing requirements as a protected interest under a statute indisputably designed to promote human health and environmental interests. Thus, under the ruling of the court of appeals, a firm or its trade association representative

may not initiate a challenge to environmental regulations under RCRA that do not apply to the firm where the sole alleged injury is that the rules do not sufficiently maintain or enhance market position or profits.

Commercial firms alleging economic injury would generally have standing to challenge rules under which they are regulated and that injure their interests, commercial or otherwise.[10] The vast majority of challenges by industry members to EPA regulations are of this type. Moreover, the firm may be a party to a challenge to alleged laxity in environmental regulation if another plaintiff or petitioner meets the applicable prudential standing requirements. Indeed, the court of appeals recognized this in the companion case to petitioner's challenge to the used-oil regulations, where petitioner was a co-petitioner with an environmental organization. *Hazardous Waste Treatment Council* v. *EPA*, 861 F.2d 270, 273 (D.C. Cir. 1988) (challenge to EPA decision not to list certain used oil as hazardous waste). Finally, the firm may, of course, continue to pursue its interests by administrative means (*e.g.*, by petitioning EPA for a rulemaking) and by legislative means. Accordingly, this case – involving only a particular application of settled legal principles – fails to raise an important question that merits review by this Court.

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[10] See Pet. App. 8a ("That the injury is commercial is no obstacle. '[S]neering at [commercial] gains by adding "mere" to them does not make them go away.' ").

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1988

HAZARDOUS WASTE TREATMENT COUNCIL,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UTILITY INDUSTRY RESPONDENTS IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether a trade association of firms engaged in the treatment of hazardous wastes has prudential standing to challenge agency action under the Resource Conservation and Recovery Act where the alleged error is the Environmental Protection Agency's failure to impose more stringent or costly regulatory requirements on the treatment firms' competitors and potential customers and the alleged injury is potential competitive loss or failure to create market opportunities for the association's members.

PARTIES TO THE PROCEEDING BELOW

The intervenors in No. 86-1143 below and thus respondents in this Court (Sup. Ct. R. 19.6) are the following associations and individual electric utility companies* (collectively referred to as "utility industry respondents"):

Edison Electric Institute
National Rural Electric Cooperative Association
American Public Power Association
American Electric Power Service Corporation and its affiliates:
- Appalachian Power Company
- Columbus Southern Power Company
- Indiana Michigan Power Company
- Ohio Power Company

Atlantic City Electric Company
Baltimore Gas & Electric Company
Boston Edison Company
Central Hudson Gas & Electric Corporation
Central Illinois Light Company
Central & South West Services, Inc.
Cincinnati Gas & Electric Company
Commonwealth Edison Company
Consolidated Edison Company of New York, Inc.
Dayton Power & Light Company
Delmarva Power and Light Company
Duke Power Company
Duquesne Light Company
Florida Power & Light Company
Gulf States Utilities Company
Houston Lighting & Power Company

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* The list of corporate affiliates required by Sup. Ct. R. 28.1 appears in the appendix to this brief.

Illinois Power Company
Indianapolis Power & Light Company
Iowa Power & Light Company
Iowa Public Service Company
Jersey Central Power & Light Company
Madison Gas & Electric Company
Minnesota Power & Light Company
Monongahela Power Company
Montaup Electric Company
New England Power Company
New York State Electric & Gas Corporation
Niagara Mohawk Power Corporation
Northern Indiana Public Service Company
Ohio Edison Company
Ohio Valley Electric Corporation
Oklahoma Gas & Electric Company
Pacific Gas & Electric Company
PacifiCorp dba Pacific Power & Light Company and
Utah Power & Light Company
Pennsylvania Power & Light Company
Philadelphia Electric Company
Potomac Electric Power Company
Public Service Company of Indiana, Inc.
Public Service Electric & Gas Company
Southern California Edison Company
Southern Company Services, Inc. and its affiliates:
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Tampa Electric Company
Texas Utilities Electric Company
The Cleveland Electric Illuminating Company
The Detroit Edison Company
The Potomac Edison Company

Toledo Edison Company
Union Electric Company
Virginia Electric & Power Company
West Penn Power Company
Wisconsin Electric Power Company
Wisconsin Power & Light Company
Wisconsin Public Service Corporation

Edison Electric Institute is the national association of investor-owned electric utility companies and acts as spokesman for those firms on subjects of national interest. The National Rural Electric Cooperative Association is the national association of rural electric cooperatives, with a membership in excess of 1,000, serving 25 million people in 46 states. The American Public Power Association is the national association of publicly-owned utilities. These associations are joined by 62 electric utility companies which collectively generate and distribute electricity to communities throughout the United States. Together, these utility companies and the members of the three associations serve more than 95 percent of the nation's consumers of electricity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1532

HAZARDOUS WASTE TREATMENT COUNCIL,
Petitioner,

V.

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UTILITY INDUSTRY RESPONDENTS IN OPPOSITION

STATEMENT

Respondents Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), and 62 individual utility companies (collectively "utility industry respondents") join with respondent Environmental Protection Agency ("EPA") in urging the Court to deny the petition for certiorari filed by petitioner Hazardous Waste Treatment Council. Because we substantially agree with

the Solicitor General in his opposition to certiorari, it is unnecessary to duplicate the Solicitor General's arguments in this brief, but we submit supplementary arguments directed primarily to No. 86-1143 (Pet. App. 1a-29a), the case below in which the utility industry respondents were parties.

A. Congress enacted the Resource Conservation and Recovery Act ("RCRA") in 1976 in response to the nation's increasing concern over the management and disposal of hazardous waste. Pub. L. No. 94-580, 90 Stat. 2795 (1976). The Act has two basic purposes: (1) to promote recovery and reuse of waste products, and (2) to establish regulatory mechanisms for managing wastes. RCRA § 1003(a), 42 U.S.C. § 6902(a). The latter goal is governed primarily by two subtitles of the Act. Subtitle C establishes a comprehensive "cradle-to-grave" scheme for regulating hazardous waste management and disposal practices,[1] while Subtitle D establishes a regulatory program for nonhazardous wastes.[2] In 1980 and again in 1984, Congress adopted significant amendments to RCRA.[3]

To implement Subtitle C, EPA since 1980 has promulgated massive regulations which govern virtually every aspect of hazardous waste management. *See* 40 C.F.R. Parts 260-72. The imposition of technically complex and costly regulations in turn has spawned a commercial waste management industry which provides off-site management services to generators of

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[1] *See* RCRA §§ 3001-19, 42 U.S.C. §§ 6921-39a.

[2] *See* RCRA §§ 4001-10, 42 U.S.C. §§ 6941-49a.

[3] Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (1980); Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984).

hazardous wastes who do not manage their own wastes. Petitioner represents the segment of that industry which provides treatment services for hazardous wastes. Pet. 3.

Although RCRA requires firms engaged in the treatment, storage or disposal of hazardous wastes to obtain a permit (RCRA § 3005(a), 42 U.S.C. § 6925(a)), any firm that demonstrates compliance with the performance and design criteria of the statute and regulations may receive a permit to manage its own wastes or the wastes of others.[4] *See* RCRA § 3005(c), 42 U.S.C. § 6925(c). As a practical matter, however, the increasing complexity and cost of compliance with EPA's rules has made it impractical and often economically impossible for small and even medium sized firms to manage their own wastes. Moreover, as Congress has limited the options for disposal of hazardous waste (*see* RCRA § 3004(b)-(g), 42 U.S.C. § 6924(b)-(g)), many generators of these wastes have turned to the commercial waste management industry, including petitioner's members, to dispose of their wastes in a manner consistent with regulatory requirements. As EPA limits the available management options or imposes costly design requirements for management facilities, fewer firms remain able to manage their own wastes.

Because the commercial hazardous waste management business has become increasingly lucrative for firms capable of meeting the EPA regulatory standards, petitioner has a powerful economic incentive to advocate even more complex and costly regulatory

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[4] RCRA's primary mission is to protect human health and the environment. *See, e.g.*, RCRA §§ 1003(a)(1),(4),(5),(8),(b), 3004(a), 42 U.S.C. §§ 6902(a)(1),(4),(5),(8),(b), 6924(a).

options. So long as petitioner's members can comply with those options, petitioner can be confident that as EPA's rules make alternative waste management options legally unacceptable or economically impractical, the rules will stimulate market demand for its members' services. *See* Pet. App. 9a n.1. Petitioner's complaint in this Court stems from this economic agenda, not from any threatened environmental injury to itself or its members.[5] According to petitioner, its members suffered injury when EPA failed to impose more comprehensive regulations on waste management alternatives because the continued availability of these alternatives diminishes the market for petitioner's members' services. Pet. 7. Petitioner objects to the exclusion of this economic injury from the "zone of interests" protected by RCRA.

B. The rules challenged by petitioner in No. 86-1143 below prohibited the burning of hazardous waste fuels and "off-specification" used oil fuels in non-industrial boilers and imposed administrative controls on fuel marketers and burners. 50 Fed. Reg. 49164 (Nov. 29, 1985). Petitioner challenged three specific provisions of the rules. The Court of Appeals found petitioner had standing to present those claims (Pet. App. 8a-9a, 16a-18a), but rejected them on the merits (Pet. App. 21a-27a). Another challenge was dismissed under a settled rule of the District of Columbia Circuit that § 7006(a)(1) of RCRA, 42 U.S.C. § 6976(a)(1), establishes exclusive review in the District of Columbia

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[5] The Court of Appeals in No. 86-1143 perceived no standing barrier to petitioner's presentation of three claims of threatened environmental injury to its members stemming from agency unlawfulness in the present rules. Those claims were rejected on the merits. *See* Pet. App. 7a, 8a-9a, 16a-18a.

Circuit only for claims that EPA rules actually adopted are invalid, not that an otherwise valid rule should have extended farther or that EPA should have adopted some other rule (Pet. App. 19a-20a). *See United Technologies Corp. v. EPA*, 821 F.2d 714, 721 (D.C. Cir. 1987).

This petition for certiorari concerns the fifth of petitioner's challenges below. Petitioner objected to a statement in the *Federal Register* preamble that accompanied the final rules in which EPA restated its five-year old interpretation of a 1980 amendment to RCRA sponsored by Rep. Bevill. EPA was responding to a question raised in the public comments seeking clarification of the regulatory status of ash residues from burning hazardous waste or used oil for energy recovery. EPA explained that under its existing rules, ash residues that exhibit a hazard characteristic as defined in EPA's rules (40 C.F.R. §§ 261.20-261.24) or that result from burning a hazardous waste listed in EPA's rules (40 C.F.R. §§ 261.30-261.33) are considered to be hazardous wastes subject to Subtitle C regulation. However, according to EPA, the effect of the Bevill Amendment is to exclude from Subtitle C regulation ash residues derived primarily from fossil fuel combustion.[6] EPA pointed to its 1981 construc-

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[6] The Bevill Amendment precludes EPA from imposing any Subtitle C regulatory requirements on wastes from fossil fuel burning utility boilers, certain mining operations, and cement kilns until EPA completes a study of those wastes, reports its findings to Congress, and makes a regulatory determination based on the study and public hearings. RCRA §§ 3001(b)(3), 8002(f),(n)-(p), 42 U.S.C. §§ 6921(b)(3), 6982(f),(n)-(p); *see Environmental Defense Fund v. EPA*, 852 F.2d 1309, 1311 (D.C. Cir. 1988).

tion of the amendment (adopted shortly after the amendment's enactment) in which it stated that the waste materials embraced by the terms of the statutory exclusion—"[f]ly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated *primarily* from the combustion of coal or other fossil fuels"[7]—include ash residues resulting from combustion of coal, oil or natural gas, a combination of those fuels, and mixtures of coal and other fuels, including hazardous waste or used oil, if coal constitutes more than 50 percent of the fuel mixture.[8] 50 Fed. Reg. at 49190. EPA confirmed similar constructions of the Bevill Amendment clauses applicable to mining and cement kiln wastes. *Id.* at 49190 n.89.

Petitioner objected to the breadth of EPA's interpretation of the exclusion because the ash from utility boilers, mining furnaces and cement kilns need not be managed in hazardous waste facilities, while the incinerator ash generated by two of petitioner's members do not qualify for the Bevill exclusion and hence must be managed in hazardous waste facilities at substantially higher cost (Pet. App. 7a).[9] The substance

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[7] RCRA § 3001(b)(3)(A)(i), 42 U.S.C. § 6921(b)(3)(A)(i) (emphasis added).

[8] This construction had been announced in a regulatory interpretive letter (*see* 50 Fed. Reg. at 49190 n.87) and applied both to the statutory exclusion as well as EPA's implementing regulation (40 C.F.R. § 261.4(b)(4)).

[9] Petitioner's argument below was not that its members are subject to overregulation, but that the beneficiaries of the Bevill Amendment exclusions are underregulated (Pet. App. 2a, 5a, 14a).

of petitioner's claimed injury was unfair competition.[10]

The Court of Appeals, relying on *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), held that petitioner's claim of competitive injury is not within the zone of interests to be protected or regulated by RCRA (Pet. App. 9a-16a). Although the court acknowledged that Congress intended to encourage proper disposal and recycling, the court declined to equate this environmental goal with an intent to benefit recycling and disposal firms (Pet. App. 11a). The court perceived no more than a marginal relationship between the economic well-being of these firms and the statute's environmental goals (Pet. App. 11a). In the absence of evidence that Congress intended to improve the competitive position of these firms or to rely on them to challenge the agency's actions, the court feared that the statute's environmental goals could be thwarted if the court were to set aside agency action at the behest of a party whose interests "coincide only accidentally" with Congress' environmental purposes (Pet. App. 11a-12). Accordingly, the court dismissed petitioner's Bevill Amendment challenge for lack of prudential standing (Pet. App. 27a).[11]

ARGUMENT

Two Terms ago, this Court in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987), reexamined the

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[10] The utility industry respondents submitted an affidavit below denying the existence of any competition between electric utilities and petitioner's members. Utilities are not in the business of managing hazardous wastes generated by third parties.

[11] Petitioner's suggestion that the Court of Appeals rehear the issue en banc was denied on December 20, 1988 (Pet. App. 29a).

doctrine of prudential standing under the Administrative Procedure Act ("APA") and provided fresh guidance on the proper application of that doctrine in the light of the APA's generous review provisions. The Court of Appeals in No. 86-1143 below, in an exceptionally detailed application of the *Clarke* rationale, determined that petitioner had standing to challenge three aspects of EPA's rules based on alleged environmental injury, but ruled that petitioner lacked standing to challenge the agency's Bevill Amendment interpretation because its only claim of injury was competitive injury. Notwithstanding petitioner's repeated charge that the Court of Appeals fashioned a new standing test of its own, we submit that the court below correctly applied *Clarke* when it barred petitioner from asserting competitive interests only marginally related to the environmental goals of RCRA. Plenary reconsideration of the prudential standing doctrine by this Court so soon after *Clarke* is not warranted.

1. Petitioner misreads *Clarke* when it accuses the Court of Appeals of applying its own test for prudential standing in lieu of the test announced in *Clarke*. According to petitioner, it is entitled to standing if its "interests bear a 'plausible relationship to the policies underlying' the relevant statute." Pet. 11 (footnote omitted). While the degree of relationship between petitioner's interest and the policies underlying the relevant statute obviously bears on the inquiry, petitioner has ignored the Court's language which defines the object and scope of the inquiry. It is that language which demonstrates that the Court of Appeals faithfully applied *Clarke* when it dismissed petitioner's challenge to EPA's Bevill Amendment

interpretation for lack of prudential standing. *See* Pet. App. 10a-11a.

The Court stated in *Clarke* that "[t]he essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.' " 479 U.S. at 399, quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 347 (1984). As an inquiry into congressional intent, "all indicators helpful in discerning that intent must be weighed." *Id.* at 400. Applying the relevant indicators of congressional intent, the Court of Appeals found no evidence that Congress intended to rely on the high tech waste treatment firms to challenge the agency's actions when the only claimed injury is a failure by EPA to stimulate greater demand for those firms' services (Pet. App. 12a-14a).

The Court of Appeals acknowledged that the test for prudential standing in the light of *Clarke* is not an especially demanding one, and it was sensitive to this Court's rejection of a line of District of Columbia Circuit cases which had equated prudential standing with evidence of congressional intent to benefit the party seeking judicial review (Pet. App. 10a & n.2). The court noted that the *Clarke* test denies a right of review where the interests of the party seeking review and the statutory purpose are only marginally related or inconsistent with each other. When the court spoke in terms of an "indicator that the plaintiff is a peculiarly suitable challenger of administrative neglect" (Pet. App. 11a), it was simply looking for signs that Congress intended to rely on a particular party to challenge agency unlawfulness. *See Clarke*, 479 U.S. at 399; *see also id.* at 400.

While the court below agreed with petitioner's claim that RCRA's aim is "to encourage proper disposal and recycling of hazardous wastes," that fact neither indicates an intent to benefit the firms that provide such services nor that their interests are more than marginally related to RCRA's environmental goals (Pet. App. 11a). Indeed, the court perceived a risk that petitioner's economic goals may thwart the statute's environmental goals and provided examples where increased regulation at the behest of commercial waste management firms could produce collateral injury to the environment (Pet. App. 11a-12a). In short, the court could find no indication of congressional intent to rely on petitioner's members as "suitable advocates of the environmental interests underlying" RCRA by virtue of the competitive advantage they secure when "the government imposed higher costs on other firms" (Pet. App. 14a).[12]

2. Petitioner asserts that RCRA establishes a policy preference for treatment and recycling over land disposal of hazardous waste, and therefore claims that Congress intended firms offering treatment and recycling services to challenge agency unlawfulness. Whether the conclusion follows from the assertion need not be decided in this case because, even if

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[12] An underlying theme of petitioner's argument is that the lower court decision in effect denies petitioner standing to participate effectively in the quasi-legislative administrative process by erecting barriers to judicial review. *See* Pet. 20, 22-25, 28-29. This is a strange argument coming from a party urging the Court to reaffirm *Clarke* because that case plainly demonstrates that access to the judicial process is subject to constitutional and statutory barriers that do not apply to participation in the administrative process. *See Clarke*, 479 U.S. at 394 & n.7, 395-96, 399.

petitioner correctly described the statutory policy, petitioner's challenge to EPA's Bevill Amendment interpretation does not champion that policy but instead frustrates it.

First, petitioner's affidavits below acknowledged that the firms purportedly injured by EPA's Bevill Amendment interpretation manage their own ash in landfills. They do not claim to recycle, reuse or treat their ash. Further, petitioner is not urging that utility ash covered by the Bevill Amendment should be recycled, reused or treated in lieu of disposal in a landfill. Indeed, EPA recently informed Congress that about 20 percent of utility ash is reused.[13]

Second, petitioner's claim of unfair competition has nothing to do with recycling, reuse or treatment as alternatives to land disposal. The waste-derived fuels at issue undergo "treatment" (*see* 40 C.F.R. § 260.10) whether they are burned in utility boilers or treatment company incinerators (although in the case of utility boilers, the Bevill Amendment interpretation makes it possible for utilities to recover the energy value in the fuel, an appropriate form of recycling).[14] The effect of overturning EPA's interpretation of the Bevill Amendment would be to frustrate the statutory

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[13] *See* EPA, REPORT TO CONGRESS, WASTES FROM THE COMBUSTION OF COAL BY ELECTRIC UTILITY POWER PLANTS, at ES-2 (Mar. 8, 1988), 134 CONG. REC. H827 (daily ed. Mar. 10, 1988) (Exec. Commun. No. 3113), 134 CONG. REC. S2686 (daily ed. Mar. 21, 1988) (Exec. Commun. No. 2810). In the same report, EPA stated that utility ash does not warrant hazardous waste regulation. *Id.* at 7-11. Hence, the statutory policy favoring treatment over land disposal of *hazardous waste* is irrelevant to nonhazardous utility ash.

[14] *See* 40 C.F.R. §§ 266.30-266.35, 266.40-266.44 (1988).

aim of RCRA by making it virtually impossible for utilities to recycle these waste-derived fuels by burning them in utility boilers.[15] These materials then would enter the nation's waste stream and perhaps be transported to one of the waste incinerators operated by petitioner's members. While petitioner purports to champion the cause of recycling, in fact its challenge would increase the volume of wastes at the expense of recycling, plainly contrary to the statute's preference for recycling and reuse over waste generation.[16] *See Clarke*, 479 U.S. at 397 n.12 (" 'zone of interest' inquiry . . . seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives").

Petitioner complains that the ash its members generate from combustion in hazardous waste incinerators must be managed in hazardous waste landfills at much higher cost than utilities incur when they manage coal combustion ash in solid waste units. But significantly, petitioner does not claim that its members' incinerator ash is not properly subject to hazardous waste regulation. Petitioner seeks uniformity of regulatory treatment for all ash residues at the most stringent level of regulation even if the ash

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[15] Utilities could not burn waste-derived fuels with coal to generate electric power if the effect were to "contaminate" in a regulatory sense the large volumes of ash residues that would then require management as hazardous wastes.

[16] *See* RCRA § 1003(a)(6), 42 U.S.C. § 6902(a)(6) ("The objectives of this Act are to promote the protection of health and the environment and to conserve valuable material and energy resources by . . . minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment").

residues are not the same. *See* note 9 *supra*. There is no question that were petitioner's members to generate ash "primarily from the combustion of coal or other fossil fuels,"[17] they, like utilities, would qualify for the alternative administrative procedures of the Bevill Amendment. The claim of "unfair competition" accordingly is incompatible with the congressional judgment in RCRA that ash derived primarily from coal should be managed differently than other ash residues. Even petitioner conceded in the Court of Appeals that restricting competition and protecting economic interests are not among RCRA's aims.[18]

Petitioner's challenge is essentially a frontal assault on the Bevill Amendment's aim that EPA be prohibited from imposing its stringent hazardous waste rules on existing management practices associated with the wastes from fossil fuel combustion before EPA completes its study of the environmental and economic consequences of these and alternative practices and determines whether existing regulatory controls are adequate to protect the environment.[19] Petitioner's challenge seeks fundamental changes in long-standing and well-known utility combustion waste management practices before EPA completes the administrative process for determining whether hazardous waste regulation of those practices is necessary.[20] The end re-

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[17] RCRA § 3001(b)(3)(A)(i), 42 U.S.C. § 6921(b)(3)(A)(i).

[18] *See* Petitioner's Supplemental Brief below at 10 n.4.

[19] *See* RCRA §§ 3001(b)(3)(A)(i), 3001(b)(3)(C), 8002(n), 42 U.S.C. §§ 6921(b)(3)(A)(i), 6921(b)(3)(C), 6982(n).

[20] As previously noted, EPA has submitted its report to Congress (*see* note 13 *supra*), but the regulatory determination required by § 3001(b)(3)(C), 42 U.S.C. § 6921(b)(3)(C), has not yet been issued.

sult of the Bevill Amendment procedure is a factually-based determination on the proper way to protect the environment, commensurate with any risks found to exist, but also taking account of other important energy policy interests.[21] To allow petitioner to interfere with that process before it is completed for the sake of its members' entrepreneurial interests would plainly "frustrate [rather] than . . . further statutory objectives." *Clarke*, 479 U.S. at 397 n.12. Accordingly, "it cannot reasonably be assumed that Congress intended to permit [this] suit." *Id.* at 399; *cf. Block v. Community Nutrition Inst.*, 467 U.S. 340, 347-48 (1984).

3. Petitioner's request that this Court review the Court of Appeals' determination on prudential standing in No. 86-1143 is virtually a request for an advisory opinion on the law of standing. In the event of a remand, petitioner's challenge to EPA's Bevill Amendment interpretation faces almost certain dismissal for want of jurisdiction for the same reason that the lower court dismissed petitioner's challenge to EPA's failure to regulate used oil generators, transporters, and storage and blending facilities.[22] The court held that a challenge to an agency's failure to regulate more comprehensively is not reviewable in the Court of Appeals under § 7006(a)(1) of RCRA, 42 U.S.C. § 6976(a)(1), because it is not a challenge to the lawfulness of rules actually adopted unless those rules foreclose more comprehensive regulation in the

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[21] *See* RCRA §§ 3001(b)(3)(C), 8002(n), 42 U.S.C. §§ 6921(b)(3)(C), 6982(n); *Environmental Defense Fund v. EPA*, 852 F.2d 1309, 1315 (D.C. Cir. 1988).

[22] The court below did not reach the jurisdictional question in the context of petitioner's Bevill Amendment challenge because its ruling on standing fully disposed of that portion of the case.

future.[23] Petitioner has not sought review of that ruling in this Court and hence it is now the law of this case[24] as well as the settled law of the District of Columbia Circuit.[25]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 19, 1989

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[23] In some circumstances, such a claim may be brought in the district courts. Pet. App. 20a.

[24] *See, e.g., Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987).

[25] *See United Technologies Corp. v. EPA*, 821 F.2d 714, 721 (D.C. Cir. 1987).

APPENDIX

LIST OF CORPORATE PARTY AFFILIATES

The following, to the best of our knowledge, is a list of parents, subsidiaries, and affiliates of corporate parties as required by Rule 28.1:

EDISON ELECTRIC INSTITUTE: None

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION: None

AMERICAN PUBLIC POWER ASSOCIATION: None

ALABAMA POWER COMPANY

Parent:	Southern Co.
Affiliates:	Georgia Power Co.
	Gulf Power Co.
	Mississippi Power Co.
	Savannah Electric Power Co.
	Southern Company Services, Inc.

AMERICAN ELECTRIC POWER SERVICE CORPORATION

Parent:	American Electric Power Co., Inc.
Affiliates:	Appalachian Power Co.
	Columbus Southern Power Co.
	Indiana Michigan Power Co.
	Kentucky Power Co.
	Ohio Power Co.

APPALACHIAN POWER COMPANY

Parent:	American Electric Power Co., Inc.
Affiliates:	American Electric Power Services Corp.
	Columbus Southern Power Co.
	Indiana Michigan Power Co.
	Kentucky Power Co.
	Ohio Power Co.

ATLANTIC CITY ELECTRIC COMPANY: None

BALTIMORE GAS & ELECTRIC COMPANY

Affiliate:	Safe Harbor Water Power Corp.

BOSTON EDISION COMPANY: None

CENTRAL HUDSON GAS & ELECTRIC CORPORATION: None

CENTRAL ILLINOIS LIGHT COMPANY

Parent:	Cilcorp, Inc.

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY: None

CENTRAL & SOUTH WEST SERVICES, INC.

Parent:	Central & Southwest Corp.
Affiliates:	Central Power and Light Co.
	Public Service Co. of Oklahoma
	Southwestern Electric Power Co.
	West Texas Utilities Co.

CINCINNATI GAS & ELECTRIC COMPANY: None

COLUMBUS SOUTHERN POWER COMPANY

Parent:	American Electric Power Co., Inc.
Affiliates:	American Electric Power Service Corp.
	Appalachian Power Co.
	Indiana Michigan Power Co.
	Kentucky Power Co.
	Ohio Power Co.

COMMONWEALTH EDISON COMPANY: None

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.: None

DAYTON POWER & LIGHT COMPANY: None

DELMARVA POWER & LIGHT COMPANY: None

DUKE POWER COMPANY: None

DUQUESNE LIGHT COMPANY: None

FLORIDA POWER & LIGHT COMPANY

Parent:	FPL Group, Inc.

GEORGIA POWER COMPANY

Parent:	Southern Co.
Affiliates:	Alabama Power Co.
	Gulf Power Co.
	Mississippi Power Co.
	Savannah Electric Power Co.
	Southern Company Services, Inc.

GULF POWER COMPANY

Parent:	Southern Co.
Affiliates:	Alabama Power Co.
	Georgia Power Co.
	Mississippi Power Co.
	Savannah Electric Power Co.
	Southern Company Services, Inc.

GULF STATES UTILITIES COMPANY: None

HOUSTON LIGHTING & POWER COMPANY

Parent:	Houston Industries, Inc.

ILLINOIS POWER COMPANY

Subsidiary:	Illinois Power Finance Co.
Affiliate:	Electric Energy, Inc.

INDIANA MICHIGAN POWER COMPANY

Parent:	American Electric Power Co., Inc.
Affiliates:	American Electric Power Service Corp.
	Appalachian Power Co.
	Columbus Southern Power Co.
	Kentucky Power Co.
	Ohio Power Co.

INDIANAPOLIS POWER & LIGHT COMPANY

Parent:	IPALCO Enterprises, Inc.

IOWA POWER & LIGHT COMPANY

Parent:	Iowa Resources, Inc.

IOWA PUBLIC SERVICE COMPANY

Parent:	Midwest Energy Co.

JERSEY CENTRAL POWER & LIGHT COMPANY

Parent:	General Public Utilities Corp.

MADISON GAS & ELECTRIC COMPANY: None

MINNESOTA POWER & LIGHT COMPANY: None

MISSISSIPPI POWER COMPANY

Parent:	Southern Co.
Affiliates:	Alabama Power Co.
	Georgia Power Co.
	Gulf Power Co.
	Savannah Electric Power Co.
	Southern Company Services, Inc.

MONONGAHELA POWER COMPANY

Parent:	Allegheny Power System, Inc.
Affiliates:	The Potomac Edison Co.
	West Penn Power Co.

MONTAUP ELECTRIC COMPANY

Parent:	Eastern Edison Co.

NEW ENGLAND POWER COMPANY

Parent:	New England Electric System
Affiliates:	Granite State Electric Co.
	Massachusetts Electric Co.
	NEES Energy, Inc.
	New England Electric Transmission Co.
	New England Energy, Inc.
	New England Hydro-Finance Co., Inc.
	The Narragansett Electric Co.
Subsidiaries:	Connecticut Yankee Atomic Power Co.
	Maine Yankee Atomic Power Co.
	Vermont Yankee Nuclear Power Corp.
	Yankee Atomic Electric Co.

NEW YORK STATE ELECTRIC & GAS CORPORATION
Subsidiary: Somerset Railroad Corp.

NIAGARA MOHAWK POWER CORPORATION: None

NORTHERN INDIANA PUBLIC SERVICE COMPANY
Parent: NIPSCO Industries, Inc.

OHIO EDISON COMPANY
Subsidiary: Pennsylvania Power Co.

OHIO POWER COMPANY
Parent: American Electric Power Co., Inc.
Affiliates: American Electric Power Service Corp.
Appalachian Power Co.
Columbus Southern Power Co.
Indiana Michigan Power Co.
Kentucky Power Co.

OHIO VALLEY ELECTRIC CORPORATION
Parents: Allegheny Power System, Inc.
American Electric Power Co., Inc.
Cincinnati Gas & Electric Co.
Subsidiary: Indiana-Kentucky Electric Corp.

OKLAHOMA GAS & ELECTRIC COMPANY: None

PACIFIC GAS & ELECTRIC COMPANY

Subidiaries:
- Alberta Natural Gas Co.
- Angus Chemical Co.
- Angus Petroleum Co.
- Pacific Gas Transmission Co.
- Standard Pacific Gas Line, Inc.

PACIFICORP dba Pacific Power & Light and Utah Power & Light

Subsidiaries:
- NERCO, Inc.
- PacifiCorp Credit, Inc.
- Pacific Telecom, Inc.
- Flight Dynamics, Inc.
- Comdial Corp.
- American Network

PENNSYLVANIA POWER & LIGHT COMPANY: None

PHILADELPHIA ELECTRIC COMPANY: None

POTOMAC ELECTRIC POWER COMPANY: None

PUBLIC SERVICE COMPANY OF INDIANA, INC.

Subsidiary: South Construction Co.

PUBLIC SERVICE ELECTRIC & GAS COMPANY

Subsidiaries:
- Energy Development Corp.
- Gasdel Pipeline System, Inc.
- Mulberry Street Urban Renewal Corp.
- PSE&G Research Corp.
- PSE&G Overseas Finance, N.V.

SOUTHERN CALIFORNIA EDISON COMPANY: None

SOUTHERN COMPANY SERVICES, INC.
Parent: Southern Co.
Affiliates: Alabama Power Co.
Georgia Power Co.
Gulf Power Co.
Mississippi Power Co.
Savannah Electric Power Co.

TAMPA ELECTRIC COMPANY
Parent: TECO Energy, Inc.

TEXAS UTILITIES ELECTRIC COMPANY
Parent: Texas Utilities Company

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
Parent: Centerior Energy Corp.

THE DETROIT EDISON COMPANY: None

THE POTOMAC EDISON COMPANY
Parent: Allegheny Power System, Inc.
Affiliates: Monongahela Power Co.
West Penn Power Co.

TOLEDO EDISON COMPANY
Parent: Centerior Energy Corp.

UNION ELECTRIC COMPANY: None

VIRGINIA ELECTRIC & POWER COMPANY
Parent: Dominion Resources, Inc.

WEST PENN POWER COMPANY
Parent: Allegheny Power System, Inc.
Affiliates: Monongahela Power Co.
The Potomac Edison Co.

WISCONSIN ELECTRIC POWER COMPANY
Subsidiary: Wisconsin Natural Gas Co.

WISCONSIN POWER & LIGHT COMPANY
Parent: WPL Holdings Inc.
Affiliate: Wisconsin River Power Co.

WISCONSIN PUBLIC SERVICE CORPORATION: None

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HAZARDOUS WASTE TREATMENT COUNCIL,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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Legislative History:

130 Cong. Rec. S13818 (Oct. 5, 1984) 1

Publications:

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PETITIONER'S REPLY BRIEF

The Government's brief in opposition to the petition does not fairly address the decisions below, this Court's decision in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), or the Hazardous Waste Treatment Council's interest and its relationship to Congress' goals in enacting RCRA. The fact remains that petitioner's interest—in the development of a "market and increased demand for new, safer treatment and disposal technologies" [1]—is precisely what Congress sought to promote as a means for achieving its ultimate environmental objectives. To reject this interest at the threshold, through the use of a misguided notion of "prudential standing,"

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[1] 130 Cong. Rec. S13818 (Oct. 5, 1984) (Sen. Chafee).

is effectively to determine the outcome of a host of important substantive issues arising from the implementation of a key environmental statute under the guise of a "jurisdictional" determination.

1. The Government's submission studiously avoids any reference whatsoever to the test for "prudential standing" actually applied by the court of appeals. Although nowhere mentioned in the Government's brief, the court below held (in the first of the cases) that a party such as petitioner cannot obtain judicial review under the APA unless he can produce "explicit evidence of congressional intent to benefit" him, or that he is, in the court's judgment, an "unusually suitable champion[] of Congress's ultimate goals." Pet. App. at 11a, 12a, 14a. In the second case, the court of appeals again recited and applied this test, citing none of the alternative formulations offered by the Government. Pet. App. at 34a, 36a. Neither respondent makes any serious attempt to justify the test for standing created and applied by the court below.

Instead, the Government argues that the court's analysis below was an attempt to find an "operational meaning for a test that demands less than a showing of congressional intent to benefit but more than a 'marginal relation[ship]' to the statutory purpose." Opp. at 8. But the analysis described in *Clarke* requires no search for an "operational meaning," let alone an "operational meaning" that contradicts the central premises of the opinion from which it is supposedly drawn. Beginning with the presumption of reviewability under the APA, *Clarke* simply requires a fair appraisal of Congress' purposes in enacting a statute and an assessment of whether the petitioner's interest bears a "plausible relationship" to effectuating the statute's underlying policies. 479 U.S. at 403. In this case, the answer to that question, which the court of appeals declined to address, is "yes."

2. The Government elects to ignore RCRA's legislative history. That history confirms that Congress was concerned about "the development of new treatment capacity," that it intended that "advanced treatment, recycling, incineration and other hazardous waste technologies should replace land disposal," that it wanted to "force the full development of alternative waste management technologies currently in existence," and that it sought to encourage "immediate investment in [the] development of alternative capacity." Pet. at 15 (citations omitted). In sum, petitioner's interest bears far more than a "plausible relationship" to the statutory purposes: its interest is in providing the technology and investing in the treatment capacity that Congress recognized was necessary to achieve its environmental goals.

The Government finds it convenient to characterize that interest as primarily pecuniary. This is beside the point. Treatment Council members have an immediate interest in providing the technology and treatment capacity that Congress wanted provided. That Treatment Council members provide these services ultimately for profit does not change the fact that in providing these services, they are doing what Congress sought to encourage.[2] By setting strict standards, Congress tried to foster development of capacity and technology to meet the Nation's environmental needs. EPA's failure to implement the standards frustrates past investment, and discourages future investment in that technology. It may be that EPA's approach is justifiable on other grounds—that is a matter for the merits—but it is hard to envision a party more concretely injured and better situated than

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[2] The underlying motive for most lawsuits is undoubtedly economic, but that has never been regarded a disqualifying factor. It can hardly be true that if the Treatment Council was composed of not-for-profit corporations, interested in developing technology and treatment capacity on a self-sustaining (but not profitable) basis, it would have a better claim to "standing."

the Treatment Council to support the statutory interest in developing treatment capacity and technology.

3. The Government takes us to task for "confus[ing] two related, but separate issues: reviewability . . . and the standing zone of interests test . . . ." Opp. at 8 n.5. According to the Government, "[t]he general presumption in favor of judicial review of agency action under the Administrative Procedure Act does not concern the issue of who are proper parties to challenge agency action." Opp. at 8 n.5.

The Government is wrong. In *Clarke*, the Court *emphasized* the close relationship between the presumption of reviewability under the APA and the proper application of the zone of interests test. 479 U.S. at 399.[3] This Court's explicit reliance on the presumption of reviewability—and the Court's departure from the near mystical inquiries and tests that had come to characterize the doctrine of "prudential standing"—was hardly inadvertent. *See, e.g., DeLoss v. Dep't of Housing & Urban Development*, 822 F.2d 1460, 1463 & n.3 (8th Cir. 1987). *Clarke* set forth a comprehensible standard, not hostile to judicial review of agency action. Application of that standard is to be guided by the presumption in favor of review and adherence to *congressional* intent. By contrast, the decision below reestablishes prudential standing as a formidable obstacle to review and gives the courts a broad subjective discretion to determine whom *they* regard as "suitable champions" of a given position.

4. The Government's approach confuses the inquiry about "prudential standing" with the inquiry on the merits. Thus, the Government argues that the central focus here is whether " 'petitioner's interests' are more

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[3] In *Clarke*, the Court repeatedly equated the two inquiries. *Id.* at 399, 400 ("The inquiry into reviewability does not end with the 'zone of interest' test.") *See also Block v. Community Nutrition Institute*, 467 U.S. 340, 348-52 (1984).

likely to frustrate than to further statutory objectives," or whether they are "inconsistent with" the statute. Opp. at 10 n.7, 11-12. But there is no inconsistency here. On the face of things, petitioner's interests are entirely consistent with Congress' desire to encourage the growth of hazardous waste treatment capacity. Faced with this apparent congruity of interests between the statute and the Treatment Council, the Government refers to the court of appeals' *hypothesis* about how strict enforcement of certain environmental laws could have the unintended consequence of actually causing more pollution. *See* Pet. App. 12a. The Government and Utility Industry Respondents also spin hypotheses of their own about how petitioner's interest in strict statutory enforcement might ultimately frustrate Congress' desire to provide a healthy environment. Opp. at 11-12; Utility Br. at 10-14.

These matters have no place in the "prudential standing" inquiry. They are for the agency to consider *on the merits* in the first instance, and for the courts to consider only upon review of an agency record. For purposes of "standing," the issue is simply whether the interest being asserted is one that has some "plausible relationship" to *Congress*' purposes, not whether the interest should prevail before the agency, or on review of the agency record in the courts. It fundamentally distorts the process to dismiss those interests, which assuredly were among those with which Congress was concerned, at the threshold.

5. Decisions about standing to review agency rulemaking necessarily have far broader impact than do decisions about standing in private rights cases or in administrative adjudications. A decision like this one, which eliminates one set of interests entirely from all future participation in the process, tends "to allow regulated industries, but not regulatory beneficiaries, to have access to court—thus imposing a perverse set of incen-

tives on administrative actors by inclining them against regulatory implementation when it is legally required." Sunstein, "Standing and the Privatization of Public Law," 88 Colum. L. Rev. 1432, 1463 (1988). Put more simply, the surest way to predetermine the outcome of an administrative dispute is to prohibit one side of the controversy from presenting its views.[4] The test for prudential standing created and applied by the court below—the court of appeals with exclusive jurisdiction over RCRA petitions—is thus not only doctrinally unsound and inconsistent with this Court's cases, but promises to skew dramatically the implementation of a key environmental statute.

CONCLUSION

The petition for certiorari should be granted.

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[4] The practical effect of the decision below is to bar from the courts those businesses with commercial interests allied with Congress' environmental objectives—businesses concretely injured by agency failures to enforce Congress' statutes—while affording free access to businesses with commercial interests *opposed* to Congress' objectives. *See* Brief for *Amici Curiae* Environmental Defense Fund, National Wildlife Federation tnd Natural Resources Defense Council, at 2-3, 8.

(4)

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BRIEF OF THE ENVIRONMENTAL DEFENSE FUND, NATIONAL WILDLIFE FEDERATION AND NATURAL RESOURCES DEFENSE COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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13 pp

QUESTION PRESENTED FOR REVIEW

Whether firms that have invested in technology for treating hazardous wastes should be disqualified from obtaining judicial review, under the Administrative Procedure Act, of Environmental Protection Agency decisions concerning regulation of hazardous waste because of the firms' financial interest in strict implementation of the regulatory statute.

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BRIEF OF THE ENVIRONMENTAL DEFENSE FUND, NATIONAL WILDLIFE FEDERATION AND NATURAL RESOURCES DEFENSE COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICI*

The *amici*, national environmental organizations, have a vital interest in the implementation and enforcement of environmental protection laws.[1] Each of these organiza-

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[1] The Environmental Defense Fund (EDF) is a national, nonprofit environmental organization with more than 100,000 members dedicated to protection of human health and the environment from exposure to toxic substances, including hazardous waste. The National Wildlife Federation is a national, nonprofit citizen conservation organization with more than 5 million members dedicated to the wise use, proper management and protection of natural resources. The Natural Resources Defense Council (NRDC) is a national, nonprofit environmental organization with approximately

tions has been an active participant in the development and implementation of the Resource Conservation and Recovery Act (RCRA), federal legislation requiring EPA to establish regulations ensuring the safe management of hazardous waste from "cradle to grave."

RCRA and many other environmental laws require executive agencies to implement complex regulatory schemes to protect against damage to public health and the environment. To ensure that these agencies carry out their statutory responsibilities, Congress has broadly authorized judicial review of agency decisions under the Administrative Procedure Act, 5 U.S.C. 702, and the underlying environmental statutes, *e.g.*, 42 U.S.C. 6976. As direct beneficiaries of the environmental protection laws, *amici* have a vital interest in ensuring that judicial review is available when executive agencies fail to carry out their statutory responsibilities.

The decision below skews Congress' plan for implementation of the environmental laws by erecting an artificial barrier to the courthouse for one class of business—firms with a financial interest in effective environmental enforcement—while permitting unfettered access to the courts for businesses opposed to stringent implementation of the environmental laws. Congress realized that the solution to many environmental problems would require the development of new technologies. It understood that a complex regulatory scheme was necessary to stimulate the development of technology for the safe treatment and disposal of hazardous waste. RCRA is a complicated statute. Proper implementation of it demands an appreciation of scientific and economic issues on the cutting edge of technological development. It is hard to believe that Congress expected important regulatory decisions to be reviewed by courts that would hear only one side of the story. Indeed, the practical effect of the decision

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92,000 members dedicated to the protection of human health and the environment from involuntary exposure to toxics, including hazardous wastes.

below is to exclude from the courts the voices of those business interests most conversant with the innovative treatment technology Congress expressly sought to promote.

As public interest organizations with limited budgets and limited technical capabilities, *amici* are not able to pursue directly every important environmental issue affecting their members. For this reason, *amici* often coordinate their efforts with businesses with congruent interests who can bring greater technical expertise and finanical resources to bear in the pursuit of more effective environmental protection. By denying standing to firms with a financial interest in implementation of environmental laws, the decision below will impose a greater burden on *amici* to carry the weight of arguments that business groups may be better able to advance. As a result, firms who undoubtedly satisfy all requirements for Article III standing will not have access to courts to advance statutory objectives, while regulated firms with a financial interest in opposing statutory objectives will continue to have access to court. This will hinder the advancement of *amici's* interests in environmental protection and undermine *amici's* ability to work with those firms with unique experience and expertise in this area.

The District of Columbia Circuit is the *exclusive* venue for review of RCRA regulations. Thus, for all practical purposes, the decision below permanently will bias judicial review under RCRA by systematically excluding from the courts businesses with unique expertise who seek to promote the very interests Congress sought to foster.

Amici submit that the decision below is erroneous. Because it will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief in support of the petition for certiorari.[2]

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[2] Pursuant to Rule 36 of Rules of the Court, the parties have consented to the filing of this brief in support of the petition for

REASON FOR GRANTING THE WRIT

I. THE DECISION BELOW ADOPTS A NOVEL AND RESTRICTIVE INTERPRETATION OF THE "ZONE OF INTERESTS" TEST FOR PRUDENTIAL STANDING IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This Court has long recognized that the class of parties who may obtain judicial review of agency action is not confined to regulated entities. *The Chicago Junction Case*, 264 U.S. 258 (1924); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Sierra Club v. Morton*, 405 U.S. 727 (1972). Repudiation of a "private-law model" of standing has been accompanied by this Court's repeated recognition that the judicial review provisions of the Administrative Procedure Act (APA) are to be broadly construed. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986). Applying this principle, the Court repeatedly has upheld the standing of litigants injured by agency action to seek judicial review under the APA. *See, e.g., Investment Company Institute v. Camp*, 401 U.S. 617 (1971); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987).

The Court has required that litigants who otherwise meet Article III requirements for standing satisfy a liberally applied "zone of interests" test first articulated in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). The test outlined in *Data Processing* is based on the Court's interpretation of section 10 of the Administrative Procedure Act (APA), 5 U.S.C. 702, which "grants standing to a person 'ag-

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a writ of certiorari. Their letters of consent have been filed with the Clerk of the Court.

grieved by agency action within the meaning of a relevant statute'." 397 U.S., at 153. Emphasizing the "broadly remedial purpose" of judicial review under the APA, 397 U.S., at 156, the Court concluded that standing should be widely available to persons suffering injury as a result of agency action. Thus it required only that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*, at 153.

In subsequent decisions, the Court has continued to adhere to a liberal interpretation of the "zone of interest" test. *Investment Company Institute v. Camp*, 401 U.S. 617 (1971). Most recently in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987), the Court explained the rare circumstances in which judicial review would be denied to a plaintiff who otherwise would qualify for standing:

> "In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." 479 U.S., at 399.

The Court emphasized that this "test is not meant to be especially demanding," noting that "there need be no indication of a congressional purpose to benefit the would-be plaintiff." *Id.*

Despite this Court's admonition in *Clarke*, the court below denied standing to petitioner Hazardous Waste Treatment Council even though petitioner's interests were directly related to, and entirely consistent with, statutory purposes. Animated by its concern over "the apparent anomaly of regulated entities demanding stricter regulation," Pet. App. 5a, the court, *sua sponte*, did precisely what *Clarke* forbade. Reversing the presumption

in favor of standing, it held that the Treatment Council's financial interest in implementation of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, disqualified it from challenging EPA regulatory decisions in the absence of a clear indication of congressional intent to benefit the treatment industry. This holding misapplies the zone of interests test and ignores the clear purposes of RCRA.

The statute and legislative history of RCRA are replete with references to the congressional objective of stimulating the development of alternative technologies for treatment of hazardous wastes, as reviewed in the Treatment Council's Petition, *see* Pet. at 15-17. The court below dismissed this ample evidence of legislative intent by concluding that it "shows neither that Congress intended to benefit recycling and disposal firms nor that such firms' interests are more than 'marginally related' to Congress's environmental purposes." Pet. App. at 11a It did so by ressurecting the very notion specifically rejected by the Court in *Data Processing*, *Investment Company Institute*, and *Clarke*: that the zone of interests test requires specific evidence of intent to benefit.[3] By holding that firms that have invested in the kind of sophisticated treatment technology Congress sought to encourage lack standing to challenge EPA's failure to implement RCRA properly, the decision below directly conflicts with this Court's articulation of the zone of interests test.

The court below found no reason to believe that hazardous waste treatment firms were "suitable challengers of the agency," Pet. App. 12a, and noted that "the consumers of the environmental purity afforded by RCRA seem highly suitable champions of enforcement," Pet.

[3] Indeed, the court below referred to "the absence of either some explicit evidence of an intent to benefit such firms, or some reason to believe that such firms would be unusually suitable champions of Congress's ultimate goals," Petition, App. 11a.

App. at 14a. But the existence of other suitable challengers of agency disregard of RCRA does not diminish the Treatment Council's standing. Unlike the situation in *Block v. Community Nutrition Institute*, 467 U.S. 340, 347 (1984), recognition of the Treatment Council's standing would not "severely disrupt [a] complex and delicate administrative scheme." Firms in the business of providing hazardous waste treatment services have unique experience and expertise in the development of safe waste disposal alternatives. Their experience and expertise is particularly relevant on issues involving the availability of treatment technology, issues that frequently arise under RCRA. The participation of such firms in the administrative process serves to advance RCRA's goal of ensuring safe management of hazardous waste while complementing the efforts of groups like *amici* who are not themselves involved in the business of providing waste treatment services. *Amici* therefore often rely on groups like the Treatment Council to take the lead in seeking review of EPA regulations.[4]

The court below could not deny that the Treatment Council's interests in this case would serve to advance the statutory goals of RCRA. Instead, the court tried to denigrate this congruity of interests by characterizing it as accidental and by arguing that in another case the Treatment Council's interests may diverge from statutory goals. Pet. App. at 11a-12a. Yet, as the legislative his-

[4] The Hazardous Waste Treatment Council has joined with environmental organizations as co-plaintiffs in successfully challenging EPA's failure to implement other provisions of RCRA. *See Environmental Defense Fund v. EPA*, 852 F.2d 1316 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 1120 (1989) (resulting in court order requiring federal regulation of certain hazardous smelter wastes); *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 270 (D.C. Cir. 1988) (resulting in court order overturning EPA decision not to regulate used oil as a hazardous waste). In the cases decided below, *amici* relied on the Treatment Council to pursue judicial review of unlawful EPA regulatory decisions without *amici's* direct participation.

tory of RCRA demonstrates, see Pet. at 15-17, the congruence of interests in this case is anything but accidental. The possibility that a party's interests may in other cases fall outside the zone of interests protected by a statute cannot justify denying that party standing in cases where its interests are congruent with statutory purposes. Moreover, the court's speculation that "technical fidelity to law" could, in other cases, harm the environment if required regulations boomerang, Pet. App. at 12a, is not grounds for denying the Treatment Council standing; rather it indicates only that Congress, like other branches of government, is not always prescient when it makes decisions.

National environmental groups like *amici* play an important role in ensuring the implementation of statutes to protect the environment, but their resources are severely limited. Thus they typically participate in the administrative process only in cases of the greatest significance. Although regulated firms also have limited resources, their financial interest in the outcome of regulatory decisions ensures their widespread participation in the administrative process.

Firms involved in the hazardous waste treatment industry have experience and technical expertise that can be extremely valuable in the development and implementation of hazardous waste regulations. Yet the decision below precludes firms from seeking judicial review of RCRA regulatory decisions unless they are regulated entities motivated by a financial interest in *weakening* regulations. Such a result "would tend to allow regulated industries, but not regulatory beneficiaries, to have access to court—thus imposing a perverse set of incentives on administrative actors by inclining them against regulatory implementation when it is legally required." Sunstein, "Standing and the Privatization of Public Law," 88 *Colum. L. Rev.* 1432, 1463 (1988). This is inconsistent with the decisions of this Court and would frustrate the implementation of statutory purposes.

CONCLUSION

For the reasons noted above, the petition for certiorari should be granted.

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